



# King & Ballow

## Employment Law Update

### Breakfast Briefing

**June 11, 2010**

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Welcome to the June, 2010 Breakfast Briefing presented by the law firm of King & Ballow in Nashville, Tennessee. Today's Breakfast Briefing will discuss employment law developments in the first half of 2010 and some things to look for in the second half of the year. Log onto [www.kingballow.com](http://www.kingballow.com) for more information on the next Breakfast Briefing or our past Breakfast Briefings.

I am Howard Kastrinsky, your host for this morning's Breakfast Briefing and the partner-in-charge of King & Ballow's Employment Discrimination Section.

Today, we will discuss recent developments under the ADA, FMLA, anti-harassment laws and whistleblower protection laws. We will also let you know about legal developments concerning independent contractor and student interns, as well as update you on health care reform, pending legislation and hiring and handbook policies.



# ADA Update

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Presented by  
Howard Kastrinsky

# A Quick ADA Review

- The “New ADA” a/k/a “ADAAA” took effect January 1, 2009
- New ADA Regulations Should Issue Summer 2010
- Courts Deny Retroactive Application of New ADA
- Few Decided Cases Under New ADA – So far
- Cases Decided under “Old ADA” Have Continuing Importance



# Recent ADA Cases

## Reasonable Accommodation Cases

- *Hawkins v. Social Security Administration* (requested at-home work or transfer to nearer office)
- *Colwell v. Rite Aid* (shift change requested due to partial blindness)
- *Verrocchio v. Federal Express* (additional leave)
- *Coleman v. Cook County* (reduced working hours for employee with larynx disorder)
- *Lowe v. Independent School District* (failure to engage in interactive process)



# Recent ADA Cases

## Qualified Individual

- *Shin v. Univ. of Maryland Medical System* (medical intern with ADD)
- *Carmona v. Southwest Airlines* (flight attendant had psoriatic arthritis)
- *Richardson v. Friendly Ice Cream Corp.* (assistant manager could not perform manual tasks)
- *Powers v. USF Holland* (100% healed policy)



# Recent ADA Cases

## Direct Threat

- *Brooks v. Micron Technology*



# Recent ADA Cases

## Medical Inquiries and Exams

- *Horgan v. Simmons* (supervisor asked "if there was something medical going on?")
- *Scott v. Napolitano* (federal court security officer with depression and anxiety discharged for refusing to answer medical examination questions and to sign a release)
- *James v. Goodyear Tire & Rubber* (machine operator with MS)
- *EEOC v. Hulsey Copper* (withdrawal of job offer to applicant after he tested positive for prescribed metehadone)



# Recent ADA Cases

## Application of New ADA Disability Standards

- *Gil v. Vortex* ("regarded as" claim)



# **Government Assault on Independent Contractor Status**

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Presented by  
Mark Hunt

# Government Assault on Independent Contractor Status

- Classifying a worker as an independent contractor rather than as an employee can make a big difference to a company's bottom line.
- Companies using independent contractors are not required to withhold taxes from payments made to those workers, nor do they have to pay federal employment taxes in relation to such payments.
- Independent contractors are generally not eligible for unemployment insurance benefits and workers' compensation.



# Government Assault on Independent Contractor Status

- Both state and federal governments have asserted that many companies are misclassifying their workers as independent contractors.
- A federal government report estimated worker misclassification will cost the U.S. Treasury more than \$7 billion in the next decade.
- States also are estimated to lose tens of millions each year in unemployment insurance revenues as a result of worker misclassification.



# Federal and State Initiatives

- President Obama's 2011 budget includes initiatives to address the issue of companies misclassifying their employees as independent contractors.
- The budget proposes \$25 million in additional funds to the Department of Labor (DOL) to hire over 100 new employees to investigate the misclassification of workers.
- The DOL would also provide competitive grants to states for addressing the issue of worker misclassification.



# Federal and State Initiatives

- The IRS has opened another front in this assault with its National Research Project (NRP).
- The NRP requires audits of approximately 6,000 companies over the next three years.
- In April of this year the Employee Misclassification Prevention Act was proposed as an amendment to the Fair Labor Standards Act, making the misclassification of workers a separate violation of that Act.



# Federal and State Initiatives

- Furthermore, bills have been introduced in Congress to limit the protections of the “safe harbor” provisions in Section 530 of the Revenue Act of 1978.
- Section 530 was enacted in 1978 in response to an increase by the IRS of employment tax audits.



# Federal and State Initiatives

- State governments also are pushing forward with initiatives of their own.
- The following states have passed or have pending legislation on this misclassification issue: Connecticut, Delaware, Illinois, Indiana, Maryland, Massachusetts, Oklahoma, Pennsylvania, Rhode Island, Wisconsin and Vermont.



# Independent Contractor or Employee?

- Companies should first consider whether they have the right to control the workers' activities.
- The more control a company has the right to exert over a worker, the more likely the worker will be deemed to be an employee.



# Independent Contractor or Employee?

- It is important to make sure there is a written independent contractor contract between the worker and the company.
- Without a contract to spell out the terms of the relationship, government agencies will often assume the worker is an employee.



# Independent Contractor or Employee?

- The IRS uses a 20-factor test for determining worker status, which is based on three aspects of the employment relationship:
  - The company's "behavioral control" over the worker;
  - The company's "financial control" over the worker; and
  - The "relationship of the parties."



# Independent Contractor or Employee?

- “Behavioral control” considerations include whether a company has the right to direct or control how the work is done, through instructions, training, or other means.
- “Financial control” considerations include whether the company has the right to direct or control the financial and business aspects of the worker’s job.
- “Relationship of the parties” considerations include how the parties perceive their relationship.



# Prepare for the Assault

- The current assault on independent contractor status is the most extensive and widespread we have seen.
- Companies using independent contractors should carefully examine their business practices to ensure that they comply with federal and state legal requirements for establishing workers as independent contractors.





# Harassment Update

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Presented by  
Angelita Fisher

# Same Sex

- Co-workers' comments that female employee received certain opportunities because of her large breast established harassment case.

– *Durkin v. Verizon New York, Inc.*, (S.D.N.Y. 2010)



# Race

- “Run Chicken Run,” picture of Confederate flag and picture of black man on a donkey did not establish harassment.
  - *Daniel v. Rutherford County*, (M.D. Tenn. 2010)

# Improper Response

- “You are Hot” comment by supervisor when employee reported sexual harassment is evidence to support a jury verdict against employer.

– *West v. Tyson Foods, Inc.*, (6th Cir. 2010)



# Age

- “Old grey-haired fart” was a stray remark and not unlawful harassment.
  - *Jackson v. Cal-Western Packaging Corp.*, (5th Cir. 2010)



# Age

- Asking female employee how old she was, saying her new hairdo made her look rejuvenated, sending her “Stages of Life” e-mail stating that older workers must “go along” so that younger ones can take their place and asking her when she was going to retire is not unlawful harassment.

– *Rodriguez-Torres v. Gov't Development Bank*, (D.P.R. 2010)



# Female Harassing Male Employee

- After consensual relationship ended, comment by female supervisor that she missed seeing the male employee naked was enough to bring into consideration three otherwise time-barred touching incidents.
  - *Turner v. The Saloon Ltd.*, (7th Cir. 2010)



# Cursing

- National Origin banter is not unlawful.
- Regular use of foul language in violation of anti-harassment policy was reason for demotion even though others also used profanity - but not to same extent.
  - *Ford Motor Credit Co. v. West Virginia Human Rights Commission*, (W.Va. 2010)



# Attorney Fees

- EEOC's Failure to Investigate results in \$4.5 Million Award of Attorney Fees to Employer.

– March 11, 2010





# **Navigating the Internship Waters**

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Presented by  
Howard Kastrinsky

# The FLSA Test for Unpaid Interns

## To use unpaid interns:

- The internship, even though it includes actual operation of the facilities of the employer, is similar in training which would be given in an educational environment;
- The internship experience is for the benefit of the intern;
- The intern does not displace regular employees, but works under close supervision of existing staff;



# The FLSA Test for Unpaid Interns

- The employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded;
- The intern is not necessarily entitled to a job at the conclusion of the internship; and
- The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.





# Retaliation in the Workplace

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Presented by  
Mark Stamelos

# Three Types of Claims

- Retaliatory Adverse action, T.C.A. section 4-21-301(1)
- Retaliatory Discharge (whistleblower), T.C.A section 50-1-304(3)(b)
- Common Law Retaliatory Discharge



# Retaliation in the Workplace

(adverse action), T.C.A. section 4-21-301(1)

- It is discriminatory practice for a person or for two or more persons to:
  - Retaliate or discriminate in any manner against a person because such person has opposed a practice declared discriminatory by this chapter or because such person has made a charge, filed a complaint, testified, assisted or participated in any manner in any investigation, proceeding or hearing under this chapter.



# **Retaliation in the Workplace**

**(adverse action), T.C.A. section 4-21-301(1)**

- The employee engaged in activity protected by the THRA;
- The exercise of the employee's protected rights was known to the defendant;
- The defendant thereafter took a materially adverse action against the employee; and
- There was a causal connection between the protected activity and the materially adverse action.



# Retaliation in the Workplace

- Retaliatory Discharge (whistleblower), T.C.A section 50-1-304(3)(b)
  1. The plaintiff's status as an employee of the defendant;
  2. The plaintiff's refusal to participate in, or to remain silent about, "illegal activities" as defined under the Act;
  3. The employer's discharge of the employee; and
  4. An **exclusive** causal relationship between the plaintiff's refusal to participate in or remain silent about illegal activities and the employer's termination of the employee.



# Common Law Retaliatory Discharge

1. An employment-at-will relationship existed;
2. The employee was discharged;
3. The reason for the discharge was that the employee attempted to exercise a statutory or constitutional right, or for any other reason which violates a clear public policy evidenced by an unambiguous constitutional, statutory, or regulatory provision; and
4. A **substantial factor** in the employer's decision to discharge the employee was the employee's exercise of protected rights or compliance with clear public policy.





# FMLA Update

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Presented by  
Howard Kastrinsky

# Recent FMLA Cases

- **Eligible Employee:** *Porcillo v. Vistar; Bailey v. Pregis*
- **Employee Notice:** *Pellegrino v. UPS; Walls v. Central Contra Costa County*
- **Serious Health Condition:** *Schaar v. Lehigh Valley Health Services; Barker v. Rooms to Go; Johnson v. Dallas Independent School District*
- **Forcing Employee to Take FMLA Leave:** *Hearst v. Progressive Foam*



# Recent FMLA Cases

- **Certification Forms:** *Brunson v. Forest Preserve; Gunzburger v. Sheriff of Broward County; Jackson v. Jerenberg Industries; Wellman v. Sutphen Corp.*
- **Termination of Employees:** *Moran v. Redford Union School District; Krutzig v. Pulte; Schaaf v. SmithKline*
- **Caring for Family Member:** *Tayag v. Lahey Clinic; Alsoofi v. Thyssenkrupp Materials*





# Legislative Update

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Presented by  
J. Wallace Irvin

# State Legislation

- English in the Workplace
  - “It is not a discriminatory practice for an employer to institute a policy requiring all employees to speak only in English at certain times when the employer has a legitimate business necessity for such a policy, including, but not limited to, the safe and efficient operation of the employer’s business, and the employer provides notice to employees of the policy and the consequences of violating that policy.”



# State Legislation

- English Only Drivers' License Exam
- Small Business Advocate
- Tennessee Workers' Compensation Requirements
  - Exempts contractors if they own at least 30 percent of the company and act as a supervisor or perform the work themselves.
  - Must renew exemption every two years and pay a \$50 filing fee.
  - Prohibits claims for injuries by exempted workers.
  - No more than three independent contractors who are exempt may work on any one project.



# Federal Legislation

- Employment Non-Discrimination Act (ENDA)
  - Prohibits discrimination on the basis of sexual orientation or gender identity
  - Disparate treatment claims only
  - Applies to Employers with 15 or more employees



# Federal Legislation

- Employee Free Choice Act (EFCA)
- Paycheck Fairness Act
- Employee Misclassification
- Franken Amendment
- FLSA – Nursing Mothers





# Handbook Policies

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Presented by  
Howard Kastrinsky

# Handbook Policies to Review

- Harassment Policy
- EEO Policy
- FMLA Policy
- Nursing Mothers
- Statement on Unions
- Solicitation, Distribution, Bulletin Board and Trespassing Policies
- Confidentiality and Wage Discussion Policies
- Social Media Policy
- Violence Policy
- Disability Leave
- Cell Phone Use





# Hiring Policies Update

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Presented by  
Angelita Fisher

# Credit Checks

- States pushing for new laws prohibiting credit checks on applicants
- *EEOC v. Freeman*
- Business Necessity for Position
- Reminder: Fair Credit Reporting Act



# Disability Issues

- BMI requirements
- Lifting requirements vs. essential job functions



# Drug Tests

- Listening to applicant's telephone conversation with MRO may violate ADA
- Effective date for new drug-testing cutoff levels postponed until October 1



# Reference Checks

- Applicants need to sign a consent form
- Social Networks – beware of privacy issues



# Non-Competes

- Ask high-level new employees to sign a non-compete agreement
- Ask if they have a non-compete agreement with their previous employer
  - If so, ask to review the agreement





# **What Businesses Need to Know About Health Care Reform**

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Presented by  
Larry Crabtree

# The Legislation

There are 2 parts to the legislation enacted to reform health care:

- The Patient Protection and Affordable Care Act (PPACA) was signed into law on March 23, 2010.
  - This was the version of PPACA passed by the Senate on December 24, 2009, and passed by the House as H.R. 3590 on March 21, 2010.
- The House Reconciliation Bill, H.R. 4872 (the "Health Care and Education Reconciliation Act of 2010"), was approved by the Senate and House on March 25<sup>th</sup>, making additional changes. It was signed by the President on March 30, 2010.
- In IRS guidance, the combined legislation is generally referred to as the "Affordable Care Act."



# New Health Care Coverage General Overview

- Health Insurance Reforms
  - 2 waves of reforms for Group Health Plans
- Health Care Exchanges
- Individual Mandate
- Employer Responsibility
- Tax Provisions



# Health Care Reforms

- Reforms are added to the HIPAA portability subparts of ERISA and the Internal Revenue Code (“IRC” or “Code”)
- 2 waves of reforms:
  - Immediate:
    - Change in definition of “dependent” for purposes of health plan tax exclusions (“child” through age 26) – effective as of March 30, 2010
    - Small employer tax credit
    - Health Care Reform – generally effective for the first plan year beginning on or after September 23, 2010
  - Other
    - Additional Health Care Reform – generally effective for plan years beginning on or after January 1, 2014



# Health Care Reforms

- The reforms do not appear to apply to:
  - Excepted-out Benefits (such as dental, vision, and Health FSAs)
  - Stand alone retiree benefit plan are most likely exempt as well (still awaiting guidance)
- Penalties for failure to comply with reforms are the same as for violating the HIPAA portability requirements under ERISA and the IRC:
  - Specific performance under ERISA
  - \$100 per day penalty under the Code
  - Mandatory Self-Reporting and excise taxes for violations (*see* IRS Form 8928)



# Change in Definition of “Dependent”

- PPACA changes the definition of “dependent” for purposes of tax free health coverage – effective March 30, 2010
  - Law amends the definition of “dependent” in Code § 105(b)
    - Any “child” (as defined in Code § 152(f)) of participant who will not attain age 27 before the end of the year may be considered a “dependent” for purposes of Section 105(b)’s exclusion of health insurance coverage from taxable income
    - “Child” is defined to include natural children of the employee and spouse, step children, adopted children, and foster children
    - No requirement that the child otherwise be a “tax dependent” for purposes of claiming an individual exemption on personal tax return; thus, coverage is available for:
      - “Stay-at-home” adult children
      - Married children who reside with their spouses and receive no support from the parent employee/participant



# Change in Definition of “Dependent”

- Employees whose children are not age 27 by 12/31/10 are eligible if children are already covered or are added to plan
- Plans Affected:
  - All IRC Section 105(b) health plans (medical, vision, dental)
  - Significant impact on Health FSA/HRA coverage that defines “dependent” by reference to Code § 105(b)
  - No impact on HSAs – further legislation required



# Change in Definition of “Dependent”

- IRS Guidance: Notice 2010-38, Tax Treatment of Health Care Benefits Provided with Respect to Children Under Age 27.
  - Published in the Internal Revenue Bulletin (IRB) on 5/17/10
  - Link: [http://www.irs.gov/irb/2010-20\\_IRB/ar08.html](http://www.irs.gov/irb/2010-20_IRB/ar08.html)
  - The IRS guidance addresses:
    - Exclusion under Code § 105(b) of Employer-provided medical care reimbursements for Employee’s child under age 27
    - Exclusion under Code § 106 of Employer-provided accident or health coverage for Employee’s child under age 27
    - Cafeteria Plans, Flexible Spending Arrangements, and Health Reimbursement Arrangements
    - FICA, FUTA, RRTA, and Income Tax Withholding Treatment
    - VEBA’s, Section 401(h) Accounts, and Code § 162(l) Deductions (the latter relates solely to Self-Employed Individuals’ deductions from AGI for costs of medical care insurance)
    - Transition Rule for Cafeteria Plan Amendments



# Change in Definition of “Dependent”

- ISSUES:
  - Plan Amendments
    - Is an amendment needed or required?
    - Some plans already incorporate the Code § 105(b) definition
    - The “transition rule” for Cafeteria Plans allows retroactive amendments to be made no later than December 31, 2010 (back to no earlier than 3/30/10).
  - Benefit Election Changes
    - The “election change” rules under Treasury Regulation § 1.125-4 are to be updated
    - Not all adult dependent children will qualify for an election change by the Employee
      - Some under-27 children may be “tax” dependents before and after the law change (*e.g.*, they reside with the Employee and are provided one-half their support by Employee)
    - Change in “status” administration issues
      - Time period for election change
      - Notice to Employees
      - When are child’s expenses eligible?
      - When would coverage increase apply?



# Small Employer Tax Credit

- Effective with tax years beginning in 2010
- Small employers with less than 25 full-time equivalent employees (“FTEs”) and pay annual average wages below \$50,000 are eligible for a tax credit equal to a portion of the employer’s cost to provide *health insurance*
- General Rules:
  - Employers must contribute at least 50% of the cost
  - Credit amount is 35% through 2013; then 50% thereafter
  - The credit amount begins to phase out for employers with more than 10 employees and/or more than \$25,000 in average wages
  - Coverage to which the credit applies:
    - Prior to 2014: apparently only to fully insured coverage
    - Starting in 2014: only to coverage offered through the Exchange
- GUIDANCE: IRS Offers Details on New Small Business Health Care Tax Credit:
  - <http://www.irs.gov/newsroom/article/0,,id=223577,00.html>
  - Includes: Step-by-Step Guide; Frequently Asked Questions; detailed IRS guidance in Notice 2010-44; and Other Links, including example scenarios of how the credit applies



# Effective in 2010 (90 days after 3/23/10)

- Temporary, national high risk pool created for individuals with pre-existing conditions but who have not been covered under creditable coverage for 6 months prior to applying for the pool.
  - Caution re: Possible Penalty: Any Insurer or Employer found to have encouraged individuals to disenroll and join the high risk pool must reimburse expenses incurred.
- Temporary re-insurance pool created for employer-sponsored providing health care coverage to retirees over 55 who are not eligible for Medicare.
  - Interim final regulations issued
  - Only \$5 billion made available for this program
  - June 1, 2010 through January 1, 2014
  - Employers must apply
  - Reimbursement for 80% of claims incurred and paid during plan year for “early retirees” between \$15,000 and \$90,000
  - “Early Retiree” is an individual (i) age 55 or older, (ii) not eligible for Medicare, (iii) not actively employed by the employer (using “current employment status” definition, and (iv) early retirees’ covered family members
  - Reimbursements must be used to “lower costs of the plan”



# Health Care Reforms

## Effective First Plan Year On or After September 23, 2010

### QUICK REFRESHER:

- Immediate – First of the 2 waves of reforms is generally effective for the 1st plan year beginning on or after September 23, 2010
- Employer incurs liability for failure to comply similar to the penalties for violating the HIPAA portability provisions under ERISA and the Code
- Not applicable to:
  - Excepted-Out Benefits
  - Stand alone retiree plans

### OTHER EXCEPTIONS:

- Grandfathered Plans
- Collectively Bargained Plans



# Grandfathered Plans

- Under PPACA Section 1251, group health plans in effect on the date of enactment (March 23, 2010) are exempt from many (but not all) of the health care reforms:
  - “Except [as provided below], with respect to a group health plan or health insurance coverage in which an individual was enrolled on the date of enactment of this Act, [the provisions added by subtitles A and C] shall not apply to such plan or coverage, regardless of whether the individual renews such coverage after such date of enactment.”
- The “grandfather” rule is not limited solely to individuals who are enrolled on the date of enactment; instead:
  - New employees (and their families) may be covered under an employer’s grandfathered plan
  - Family members of current employees who are enrolled in the grandfathered plan may also be added
  - Unanswered Questions: What about existing employees who are not covered in an otherwise “grandfathered” plan on the date of enactment? Can they be enrolled without problems?
- CAUTIONARY QUESTION: What changes can be made to an existing Plan or insurance coverage without compromising “grandfathered” status? (Awaiting further guidance)



# Collectively Bargained Plans

- Group health plans or arrangements that are subject to collective bargaining agreements (CBAs) which were ratified prior to March 23, 2010, are not subject to the health care reforms until the date the CBA is terminated or expires.
- Issues:
  - Which Employer plans are “maintained” pursuant to a CBA?
  - What if the plan also covers non-bargaining unit employees?
  - Is an Employer plan that is “maintained” pursuant to a CBA also considered a “grandfathered” plan?
- Compliance Date: The compliance date is, literally, the date that the last applicable CBA related to such plan or coverage terminated or expires, not the next plan year.



# Immediate Health Care Reforms:

Effective for the First Plan Year Beginning On or After September 23, 2010

REFERENCE NOTE: Numerous reform provisions also apply to “grandfathered” health plans. They are shown as “NGF” (“Non-Grand-Fathered”).

- (NGF) No pre-existing condition exclusions are allowed for enrollees under the age of 19.
  - May apply to young employees, to employees’ spouses, or to dependent children
- (NGF) No lifetime limits are allowed, and only a “restricted annual limit” on the value of essential benefits are allowed.
  - Exception: The legislation generally allows annual or lifetime limits on “non-essential” benefits.
- (NGF) No rescission of coverage is permitted except in cases of fraud or intentional misrepresentation.
  - What effect does this rule have on “dependent” audits?



# Immediate Health Care Reforms:

Effective for the First Plan Year Beginning On or After September 23, 2010

- (NGF) Plans that cover dependent children must continue coverage for a dependent child *up to* age 26.
  - Exception for “grandfathered” plans: There is no requirement to cover *if* the child is eligible for other employer-sponsored coverage – for example, where the child is covered where they work. (this exception applies until 1/1/2014)
  - Coverage requirement applies to “married” children
  - No variation in the premium is permitted if variation is based on age
  - The only permissible condition of eligibility other than age 26 relates to the relationship between the employee and the “child”
    - The following are “prohibited” conditions of eligibility:
      - Student status
      - Residency
      - Financial dependency
  - However, there is no requirement to cover children of covered dependent children



# Immediate Health Care Reforms:

Effective for the First Plan Year Beginning On or After September 23, 2010

- (NGF) Must prepare and distribute a new “Summary of Coverage”
  - Distributed at enrollment, no more than 4 pages, and printed in 12-point font
  - Notice of material changes in Summary required 60 days prior to effective date
  - Agencies will identify additional requirements with 12 months
  - Plans will have an additional 12 months to distribute
  - NOTE: Odd effective date for “grandfathered” plans
- (NGF) Cost reporting and rebate requirements:
  - Health insurers must report to HHS regarding loss ratios under policies
  - Rebates to enrollees are required if medical loss ratio exceeds certain requirement
- Fully-Insured Plans sponsored by Employers generally will be required to satisfy the same Code § 105(h) non-discrimination requirements applicable to self-insured medical expense reimbursement plans



# Immediate Health Care Reforms:

Effective for the First Plan Year Beginning On or After September 23, 2010

- First dollar coverage (no cost sharing) must be provided for certain evidence-based preventive care (i.e., for certain physical diagnostic examinations, including well-child care), as well as for certain immunizations.
- Requirements for ensuring quality of health care:
  - Implementation and reporting of certain reimbursement structures under the plan, including implementation of wellness programs
  - Criteria to be developed within 2 years of date of enactment
- Appeals process changes, including allowing claimants to continue receiving coverage during the appeals process and providing for an external review process to be established by the Secretary of HHA and/or State law for fully insured plans.



# Immediate Health Care Reforms:

Effective for the First Plan Year Beginning On or After September 23, 2010

- Special rules regarding health care providers:
  - Allow plan enrollees to select their primary care provider, or pediatrician in the case of a child, from any available participating primary care providers;
  - Preclude the need for prior authorization or increased cost-sharing for emergency services, whether provided by in-network or out-of-network providers; and
  - Preclude plans from requiring authorization or referral by the plan for obstetrical or gynecological care.



# 2nd Wave of Health Care Plan

Reforms: Effective for the First Plan Year Beginning On or After January 1, 2014

- (NGF) No preexisting condition exclusions or limitations are permitted
- (NGF) There will be a prohibition on excessive waiting periods – that is, no waiting period in excess of 90 days
- No discrimination based on health status will be permitted
  - Basically, the same rules that currently exist under HIPAA
  - The legislation raises the maximum incentive amount for wellness programs that provide the incentive based on achieving a health standard from 20-30% of the COBRA cost of coverage
  - The Secretaries of Labor, HHS, and the Treasury are given discretion to increase the percentage to 50%
- Cost Limitations:
  - Out-of-pocket expenses may not exceed the amount applicable to coverage related to health savings accounts (HSAs)
  - Deductibles may not exceed \$2,000 for single coverage and \$4,000 for family coverage (as indexed)
  - Deductible limitation may apply only to fully insured plans in the small group market



# 2nd Wave of Health Care Plan

Reforms: Effective for the First Plan Year Beginning On or After January 1, 2014

- Fully-insured plans in the small group market must provide essential benefits
  - Not applicable to fully-insured plans in the large group market or to self-insured plans.
- Group and individual plans are required to cover routine costs of participation in certain clinical trials by qualified individuals
- No discrimination is permitted against providers who act within the scope of their license
  - This is not an “any willing provider” statute
- Fair Health Insurance Premiums (applicable only to insurers)
  - Limitations on premium setting (e.g., limitations on premium setting based on age, tobacco use)
- Guaranteed availability and renewability (applicable to insurers)
  - Health insurers in individual or group market must accept every employer or individual that applies
  - Health insurers in individual or group market must renew any individual/employer that wishes to renew



# Grandfathered Plans

- Grandfathered plans are subject *only* to the following requirements:
  - Uniform explanation of coverage (Summary of Coverage)
  - Cost reporting and rebates
  - Notification of availability of the exchange and subsidies
  - Coverage of adult children
  - Limitation on lifetime and annual limits
  - Limitation on preexisting condition exclusions
  - Prohibition on rescissions of coverage
  - Limitation on waiting periods



# Other Changes Effective in 2011

- Over-the-Counter (OTC) expenses for “medicines or drugs” are not eligible for reimbursement under a flexible spending account (FSA), health reimbursement account (HRA), or health savings account (HAS) without a doctor’s prescription.
  - Related to expenses incurred in calendar year 2011; not based on “plan year”
    - Considerations:
      - Plans with fiscal plan years
      - Grace periods
  - Significant impact on debit cards
  - What is a “medicine or drug”? (Awaiting guidance?)



# Other Changes Effective in 2011

- “Small employers” who establish *simple cafeteria plan* will be exempt from certain non-discrimination requirements.
  - A “small employer” is an employer with 100 or fewer employees during either of the 2 preceding years (provided it is a full year)
  - Employer contribution for qualified employees and eligibility requirements must be met
  - If satisfied, the *simple cafeteria plan* is exempt from the non-discrimination requirements under the following:
    - Code § 79
    - Code § 105(h)
    - Code § 125
    - Code § 129



# Other Changes Effective in 2011

- W-2 reporting is required with respect to the value of coverage offered in 2011 and later years (*first W-2 report filed in 2012*).
- Excise tax for non-medical distributions from HSAs is increased from 10% to 20%.
- A new sector tax is imposed on health insurers (but not self-insured plans or TPAs) starting in 2011.



# Changes Effective in 2013

- There is a 0.9% increase in Medicare taxes for those earning more than \$200,000 for single individuals and \$250,000 for joint filers
- Such individuals would also be subject to a 3.8% tax on their “net investment income” (to the extent that their total income exceeds the thresholds)
- Health FSA salary reductions will be limited to \$2,500 each year.
  - The cap is indexed to the CPI beginning in 2014
- The deduction previously permitted for amounts allocable to the Medicare Part D subsidy for prescription drug plans is eliminated.



# Changes Effective in 2013

- Effective beginning March 1, 2013, employers must notify employees at the time of hiring of:
  - The existence of the exchange;
  - That the employee may be eligible for a subsidy under the exchange if the employer's share of total costs of benefits is less than 60%; and
  - That if the employee purchases a policy through the exchange without the employer providing a voucher, he or she may lose the employer contribution to any health benefits offered by the employer.
- CER fee: A fee equal to \$2 (\$1 in 2013) multiplied by the average number of covered lives is imposed. The fee applies to both fully-insured and self-insured plans.



# Health Insurance Exchanges

## Effective in 2014 and After

- PPACA provides funds to states to establish a health insurance exchange through which individuals may purchase health insurance beginning in 2014.
- Exchange-related provision in PPACA impact employers in the following ways:
  - Beginning in 2014, only “small employers” may participate – *i.e.*, employers with 100 employees or less (except in states that limit small employers to employers with 50 or fewer employees).
    - Beginning in 2017, states may allow all employers of any size to offer coverage through the exchange.
  - Employers who offer coverage through the exchange may permit employees to pay for such coverage with pre-tax dollars through the employer’s cafeteria plan.



# Individual Responsibility

## Effective Beginning January 1, 2014

- “Applicable Individuals” shall ensure that the applicable individual and any “dependent” of the applicable individual have “minimum essential coverage”
  - Coverage compliance is determined monthly
- Key terms:
  - “Applicable Individual”:
    - All persons for any month, unless they fall in one of four categories:
      - Prisoners – other than simply pending disposition of charges
      - Health care sharing ministry (HCSM) members – where the HCSM is a public charity and satisfies other specified tests
      - Religious conscience – members of recognized religious sect, etc., conscientiously opposed (certified as exempt by an American Health Benefit Exchange)
      - Undocumented aliens – Persons are not included if, for any month, they are not citizens or nationals of the U.S., or aliens lawfully present in the U.S.



# Individual Responsibility

## Effective Beginning January 1, 2014

- Key terms (cont.):
  - “Dependent” – someone for whom a dependency exemption is or may be claimed
  - “Minimum Essential Coverage” is coverage under any of the following:
    - A government sponsored program (*e.g.*, Medicare, Medicaid, CHIP, Tricare for Life, veteran’s health care program, Peace Corps volunteers health plan);
    - An eligible employer-sponsored plan (a *group* health plan or *group* health insurance coverage);
    - A health plan offered in the *individual* market within a state;
    - A “grandfathered” health plan; or
    - Other health coverage, such as a state health benefit risk pool, that the Secretary of HHS and the Treasury Secretary recognize for this purpose.
- NOTE:
  - “Excepted Benefits” do not qualify as “minimum essential coverage”
  - Entity that provides coverage must file report regarding the coverage



# Individual Responsibility

## Effective Beginning January 1, 2014

- A penalty is imposed on Individuals without health insurance.
  - Also called a “shared responsibility payment”
- In 2008, uninsured Americans received about \$116 billion worth of health care.
  - Those uninsured paid for about 1/3 of that total, or some \$38.6 billion of the cost of the care received.
  - Governments and charities paid for about 1/4 of that cost, or some \$29 billion.
  - The remainder, or some \$48.3 billion of the cost, was uncompensated health care services.



# Individual Responsibility

## Effective Beginning January 1, 2014

- Recoupment of Uncompensated Health Care Services: These uncompensated costs are *recouped* via higher charges for all health care services.
- Effect: Increases health insurance premiums.
  - One study concluded that, in 2008, this “stealth premium” increased annual insurance premiums:
    - By \$1,017 for family coverage; and
    - By \$368 for individual coverage.
    - *See* – “Hidden Health Tax: Americans Pay a Premium”, Families USA, May 2009, at:

[www.familiesusa.org/resources/publications/reports/hidden-health-tax.html](http://www.familiesusa.org/resources/publications/reports/hidden-health-tax.html)



# Individual Responsibility

## Effective Beginning January 1, 2014

- Excise tax penalty: If the “applicable individual” fails to satisfy the requirement, then the applicable individual must pay an excise tax *penalty* equal to the *lesser* of:
  1. the sum of the *monthly penalty amounts* for the tax year, or
  2. the amount of the *national average premium* for qualified health plans that meet specified conditions.
    - The *monthly penalty* for any taxpayer who fails to have minimum essential coverage is equal to:
      - One-twelfth (1/12) of the *greater* of:
        - a) the *flat dollar amount* (equal to the “applicable dollar amount” of: \$95 for 2014, \$325 for 2015, \$695 for 2016, and indexed for inflation thereafter) multiplied by the individuals not properly insured by the taxpayer, up to a maximum of 300% of the applicable dollar amount; or
        - b) the *applicable percentage of income* (equal to 1.0% for 2014, 2.0% for 2015, and 2.5% thereafter of the excess of the taxpayer’s household income over the taxpayer’s filing threshold for the tax year).



# Individual Responsibility

## Effective Beginning January 1, 2014

- No penalty applies *if* someone is unable to “afford” coverage.
  - Coverage is “unaffordable” if the required contribution will exceed 8% of the individual’s “household” income.
    - “Household” income is:
      - Gross income of the individual, spouse and dependents (basically anyone for whom the individual may claim an exemption);
      - Increased by any pre-tax salary reductions.
    - If it is employer-sponsored coverage, the calculation is based on the portion of the cost payable by the employee for self-only coverage.
      - Each “dependent” determination would be made based on the employee’s determination.
- QUESTION: What level of coverage must be provided in order to qualify as “minimum essential coverage”?
  - Will guidance be forthcoming?



# Vouchers

- Employers that offer minimum essential coverage and make a contribution must offer “free choice vouchers” to qualified employees for the purchase of qualified health plans through exchanges.
- The free choice voucher must be equal to the contribution that the employer would have made with respect to the option for which the employer pays the largest portion.
  - Based on the level of coverage elected by the employee.
- Employees “qualify” if:
  1. their household income does not exceed 400% of the federal poverty level, and
  2. the employees’ required contribution under the employer’s plan would be between 8% and 9.8% of their household income.



# Vouchers

- Tax Treatment of Vouchers; Related Rules:
  - Free choice vouchers are excludible from employees' incomes, to the extent used for health care).
  - Free choice vouchers are deductible by the employer.
  - Excess employer contribution (above voucher amount for coverage level elected) must be paid to the employee as taxable compensation.
  - Voucher recipients are not eligible for tax credits through the exchange.



# Employer Responsibility

- ENROLLMENT REQUIREMENTS: Employers with 200 or more full-time employees who offer coverage to full-time employees must:
  - Automatically enroll all new full-time employees in “one of the plans offered”.
  - Continue the enrollment of existing full-time employees.
    - Guidance is needed regarding existing full-time employees who are not currently enrolled.
      - Must they be enrolled?
  - Provide notice of the employee’s right to opt out.
  - Effective Date: No effective date is stated in the law, so the automatic enrollment provision is considered effective on the date of enactment.



# Employer Responsibility

- Two (2) “Play or Pay” Mandates – Beginning January 1, 2014.
- Employers with 50 or more full-time employees are potentially subject to penalties, with the employee-count determined under the following rules:
  - If the employer was not in existence in the preceding year, then it is based on the average number expected to be employed during the current calendar year
  - Part-time employees are taken into account solely for determining if an employer employed, on average, at least 50 employees on business days during the preceding calendar year.
    - The number of full-time employees otherwise determined is increased by the number computed by dividing the aggregate number of hours of service of employees who are not full-time employees by 120.
  - Employers who are “applicable large employers” solely because seasonal employees who are otherwise full-time employees and who work less than 120 days during the year are NOT considered “large employers”
  - The determination is based on the “controlled group” rules



# Employer Responsibility

- “Play or Pay” Mandate #1 – Effective January 1, 2014.
  - Applicable employers who fail to offer full-time employees minimum essential coverage must pay a penalty with respect to each full-time employee in any month in which any full-time employee receives a federal subsidy for the Exchange.
    - The penalty is determined on a monthly basis
    - The penalty amount is the product of the total number of full-time employees of the employer (in excess of 30 employees) for that month times 1/12 of \$2000.
      - For example, a business with 43 employees that does not offer coverage is subject to a tax equal to 13 times the applicable payment amount.



# Employer Responsibility

- “Play or Pay” Mandate #2 – Effective January 1, 2014.
  - Even when coverage is extended, applicable employers, who offer minimum essential coverage for any month to a full-time employee who is certified as having enrolled in the exchange and received a tax subsidy, is subject to a penalty equal to the product of:
    - a) the total number of such full-time employees who have received a subsidy, times
    - b) 1/12 of \$3000 (capped at 1/12 of \$2000 times the total number of full-time employees in excess of 30 during such month).

**NOTE:** Employees who are offered employer coverage are not eligible for a credit unless their required premium exceeds 9.5% of their household income or the plan’s share of allowed costs is less than 60%.



# Employer Responsibility

- Increased Large Employer Reporting Obligations.
  - Effective January 1, 2014, large employers (50 +) must:
    - Provide confirmation that they offer (or do not offer) minimum essential coverage to their full-time employees and their dependents;
    - Report the length of any applicable waiting period;
    - Confirm the lowest-cost option in each enrollment category under the plan;
    - Report the Employer's share of the total allowed costs of benefits provided under the plan; and
    - Report the total number and names of full-time employees receiving health care coverage.



# Cadillac Plan Tax

- Beginning in 2018, PPACA (as modified by the Reconciliation Bill) imposes a 40% excise tax on:
  - “Coverage providers” – for the sum of months during which the aggregate value of employer-sponsored health care coverage for the employee exceeds:
    - 1/12 of \$10,200 for single coverage and \$27,500 for family coverage.
      - The higher family coverage threshold applies to both single and family coverage offered under a multiemployer plan.
      - These threshold amounts are to be adjusted automatically if health costs increase by more than anticipated before 2018.
      - The thresholds are increased by CPI + 1 in 2019, and by CPI each year thereafter.
      - An employer may make an adjustment to reduce the cost of plans when calculating the tax if the employer’s age and gender demographics are not representative of a national average.
      - The PPACA transition rule for high cost states does not apply.



# Cadillac Plan Tax

- The annual limit for retirees between ages 55 and 64, for individuals engaged in certain high-risk professions (*e.g.*, law enforcement professionals, EMTs, longshoremen, construction workers, and miners), and for those employed to install electrical or telecommunication lines, is increased to \$11,850 for individual coverage and to \$30,950 for family coverage.
- Determination of whether excess coverage exists is made with respect to the employer and assessed against “coverage providers”
- “Coverage providers” are defined to include the following:
  - In the case of fully-insured plans, the health insurer
  - In the case of HSA or medical savings account (MSA) contributions, the employer making the contributions
  - In the case of a self-insured plan or flexible spending account (FSA), the person that administers the plan (*e.g.*, the TPA)
- In many cases, employer-sponsored coverage will include both fully-insured and self-insured contributions (and may also include HAS contributions).
  - The coverage provider’s applicable share of the tax will bear the same ratio to the total excess benefit as the cost of the coverage provider’s coverage bears to the total value of employer-sponsored coverage.



# Cadillac Plan Tax

- The coverage subject to the excise tax rule includes:
  - The applicable premium (determined in accordance with COBRA rules) for all accident and health coverage provided by the employer, even if paid for with after-tax dollars from the employee (except vision only insurance, dental insurance, accident & disability insurance, long-term care insurance, and after-tax funded hospital indemnity and/or specified disease coverage);
  - Both non-elective and salary reduction contributions to a health FSA; and
  - Employer contributions (presumably including salary reductions) to an HAS.
- Starting in 2011 (reported in 2012), employers must include the value of all such coverage on each employee's Form W-2.





# Questions & Answers

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