

TIMELINE OF TAX CHANGES IN HEALTH CARE REFORM LEGISLATION

In March of 2010, Congress passed and the President signed into law legislation that overhauls the U.S. health care system and affects nearly all taxpayers, many employers, and many elements of the health care industry (the Patient Protection and Affordable Care Act (Health Care Act, or “PPACA,” P.L. 111-148, and the Health Care and Education Reconciliation Act of 2010 (Reconciliation Act, or “HCERA,” P.L. 111-152). The massive overhaul contains a host of tax changes, many of which are both complex and novel. To compound the challenge, the tax changes go into effect over a number of years-ten if two retroactively effective tax changes are counted and nine if they are not.

Tax Changes Retroactively Effective to 2009

Investment credit for qualifying therapeutic discovery projects. For expenses paid or incurred after Dec. 31, 2008, there is a new 50% nonrefundable investment tax credit for qualified investments in qualifying therapeutic discovery projects. (Code Sec. 48D) A total of \$1 billion is allocated to such projects during the 2009 through 2010 period. The credit is available only to companies having 250 or fewer employees. A “qualifying therapeutic discovery project” is one designed to develop a product, process, or therapy to diagnose, treat, or prevent diseases and afflictions by: (1) conducting pre-clinical activities, clinical trials, clinical studies, and research protocols, or (2) developing technology or products designed to diagnose diseases and conditions, including molecular and companion drugs and diagnostics, or to further the delivery or administration of therapeutics.

Exclusion for state student loan repayment or loan forgiveness programs for health professionals. For amounts received by an individual in tax years beginning after Dec. 31, 2008, the gross income exclusion for amounts received under the National Health Service Corps loan repayment program or certain State loan repayment programs is modified to include any amount received by an individual under any State loan repayment or loan forgiveness program that is intended to provide for the increased availability of health care services in underserved or health professional shortage areas (as determined by the State). (Code Sec. 108(f)(4))

Tax Changes Taking Effect in 2010

New qualification requirements for nonprofit hospitals. For tax years beginning after Mar. 23, 2010, detailed new qualification requirements apply to any Code Sec. 501(c)(3) organization that operates at least one hospital facility. (Code Sec. 501(r) and Code Sec. 6033(b)) These requirements include: conducting, implementing and widely publicizing a community health needs assessment; adopting and implementing a written financial assistance policy; and adopting and implementing a nondiscriminatory policy to provide emergency medical treatment to individuals. (Code Sec. 5000B(a))

Tanning services excise tax. For indoor tanning services performed on or after July 1, 2010, a new 10% excise tax is imposed on any indoor tanning service, whether paid for by insurance or otherwise. The tax is imposed on tanning service recipients (although the provider is secondarily liable). (Code Sec. 5000B(a))

Small employer health insurance credit. For tax years beginning after Dec. 31, 2009, an eligible small employer (ESE) is entitled to a tax credit for making nonelective contributions to buy health insurance for its employees. (Code Sec. 45R) An ESE generally is an employer with no more than 25 full-time equivalent employees (FTEs) employed during its tax year, and whose employees have annual full-time equivalent wages that average no more than \$50,000. However, the full amount of the credit is available only to an employer with 10 or fewer FTEs and whose employees have average annual full-time equivalent wages from the employer of less than \$25,000.)

Expanded dependent coverage in employer health plans. Effective on Mar. 30, 2010, the general exclusion for reimbursements for medical care expenses under an employer-provided accident or health plan is extended to any child of an employee who hasn't attained age 27 as of the end of the tax year. (Code Sec. 105(b)) This change is also intended to apply to the exclusion for employer-provided coverage under an accident or health plan for injuries or sickness for such a child. A parallel change applies for voluntary employees' beneficiary associations (VEBAs) (Code Sec. 501(c)(9)), and for Code Sec. 401(h) accounts. (Code Sec. 401(h)) Code Sec. 162(l) is similarly amended to allow self-employed individuals to take a deduction for health insurance costs of any child of the taxpayer who has not attained age 27 as of the end of the tax year. (Code Sec. 162(l)(1)(D))

Codification of economic substance, imposition of new penalties. For transactions entered into after Mar. 30, 2010 and for underpayments, understatements, and refunds and credits attributable to transactions entered into after Mar. 30, 2010, the following rule applies to any transaction to which the economic substance doctrine is relevant: The transaction has economic substance only if, apart from federal income tax effects, (1) the transaction changes in a meaningful way the taxpayer's economic position; *and* (2) the taxpayer has a substantial purpose for entering into such transaction. (Code Sec. 7701(o)(1)) For underpayments attributable to transactions entered into after Mar. 30, 2010, a new strict liability penalty under Code Sec. 6662 applies for an underpayment attributable to any disallowance of claimed tax benefits by reason of a transaction lacking economic substance (as defined in Code Sec. 7701(o)), or failing to meet the requirements of any similar rule of law. (Code Sec. 6662(b)(6)) The penalty rate is 20% (increased to 40% if the taxpayer doesn't adequately disclose the relevant facts affecting the tax treatment in the return or a statement attached to the return). (Code Sec. 6662(i)(1)) Several other penalty related provisions apply. (Code Sec. 6676(c)) (Code Sec. 162(l)(1)(D))

Eased rules for adoption credit and exclusion for employer-provided adoption assistance. For tax years beginning after Dec. 31, 2009, the maximum adoption credit is increased to \$13,170 per eligible child (a \$1,000 increase) for both non-special needs adoptions and special needs adoptions. (Code Sec. 36C) The adoption credit is made refundable. The maximum exclusion for employer-provided adoption assistance also is increased to \$13,170 per eligible child (a \$1,000 increase). (Code Sec. 137) (Code Sec. 162(l)(1)(D))

Tax breaks eliminated for health organizations with medical loss ratios below 85%. For tax years beginning after Dec. 31, 2009, health organizations whose medical loss ratio is below 85% cannot take advantage of the favorable tax provisions of Code Sec. 833 including treatment as a stock insurance company. (Code Sec. 833(c)(5)) (Code Sec. 162(l)(1)(D))

Tightened rules for cellulosic biofuel producer credit. For fuels sold or used on or after Jan. 1, 2010, the cellulosic biofuel producer credit is not available for fuels with significant water, sediment, or ash content, such as “black liquor.” (Code Sec. 40(b)(6)(E)) (Code Sec. 162(l)(1)(D))

Tax Changes Taking Effect in 2011

W-2 must include cost of employer-provided health insurance. For tax years beginning after Dec. 31, 2010, an employer must disclose on each employee's annual Form W-2 the value of the employee's health insurance coverage sponsored by the employer. (Code Sec. 6051(a)(14))

Restricted definition of medicine for health plan reimbursements. The cost of over-the-counter medicines can't be reimbursed with excludible income through a health flexible spending arrangement (FSA), health reimbursement account (HRA), health savings account (HSA), or Archer MSA, unless the medicine is prescribed by a doctor. For HSAs and Archer MSAs, this applies for amounts paid with respect to tax years beginning after Dec. 31, 2010; for health FSAs and HRAs, it applies for expenses incurred with respect to tax years beginning after Dec. 31, 2010. (Code Sec. 106(f), Code Sec. 220(d)(2)(A), and Code Sec. 223(d)(2)(A))

Boosted tax on nonqualifying HSA and Archer MSA distributions. For disbursements made during tax years starting after Dec. 31, 2010, the additional tax on distributions from an HSA that are not used for qualified medical expenses is increased from 10% to 20% of the disbursed amount, and the additional tax on distributions from an Archer MSA that are not used for qualified medical expenses is increased from 15% to 20% of the disbursed amount. (Code Sec. 220(f)(4)(A) and Code Sec. 223(f)(4)(A))

Annual fee on drug manufacturers and importers. For calendar years beginning after Dec. 31, 2010, each manufacturer or importer with gross receipts from branded prescription drug sales that is engaged in the business of manufacturing or importing such drugs for sale to any specified government program or pursuant to coverage under any such program, must pay an annual nondeductible fee, which will be credited to the Medicare Part B trust fund. (PPACA Sec. 9008) The annual flat fee (e.g., \$2.5 billion for 2011) is apportioned among the covered entities each year based on each entity's relative share of branded prescription drug sales taken into account during the previous calendar year.

Small employers may establish “simple cafeteria plans.” For years beginning after Dec. 31, 2010, small employers (average of 100 or fewer employees on business days during either of the two preceding years) may provide employees with a “simple cafeteria plan.” (Code Sec. 125(j)) Under such a plan, the employer is provided with a safe harbor from the nondiscrimination requirements for cafeteria plans as well as from the nondiscrimination requirements for specified qualified benefits offered under a cafeteria plan, including group term life insurance, benefits under a self-insured medical expense reimbursement plan, and benefits under a dependent care assistance program.

Tax Change Taking Effect in 2012

Information reporting required for payments to corporations. For payments made after Dec. 31, 2011, businesses that pay any amount greater than \$600 during the year to non-tax-exempt corporate providers of property and services will have to file an information report with each provider and with IRS. (Code Sec. 6041(h))

Tax Changes Taking Effect in 2013

Increased HI tax for high-earning workers and self-employed taxpayers. For tax years beginning after 2012, an additional 0.9% hospital insurance (HI) tax applies under Code Sec. 3101(b)(2) to wages received with respect to employment in excess of: \$250,000 for joint returns; \$125,000 for married taxpayers filing a separate return; and \$200,000 in all other cases. Under Code Sec. 1401(b)(2), the additional 0.9% HI tax also applies to self-employment income for the tax year in excess of the above figures. (Code Sec. 6051(a)(14))

Surtax on unearned income of higher-income individuals. For tax years beginning after Dec. 31, 2012, an unearned income Medicare contribution tax is imposed on individuals, estates, and trusts. (Code Sec. 1411) For an individual, the tax is 3.8% of the lesser of either (1) net investment income or (2) the excess of modified adjusted gross income over the threshold amount (\$250,000 for a joint return or surviving spouse, \$125,000 for a married individual filing a separate return, and \$200,000 for all others). For surtax purposes, gross income doesn't include excluded items, such as interest on tax-exempt bonds, veterans' benefits, and excluded gain from the sale of a principal residence.

Higher threshold for deducting medical expenses. For tax years beginning after Dec. 31, 2012, unreimbursed medical expenses will be deductible by taxpayers under age 65 only to the extent they exceed 10% of adjusted gross income (AGI) for the tax year. (Code Sec. 213(a)) If the taxpayer or his or her spouse has reached age 65 before the close of the tax year, a 7.5% floor applies through 2016 and a 10% floor applies for tax years ending after Dec. 31, 2016. (Code Sec. 213(f))

Dollar cap on contributions to health FSAs. For tax years beginning after Dec. 31, 2012, for a health FSA to be a qualified benefit under a cafeteria plan, the maximum amount available for reimbursement of incurred medical expenses of an employee (and dependents and other eligible beneficiaries) under the health FSA for a plan year (or other 12-month coverage period) can't exceed \$2,500. (Code Sec. 125(i)) (Code Sec. 213(f))

Deduction eliminated for retiree drug coverage. Sponsors of qualified retiree prescription drug plans are eligible for subsidy payments from the Secretary of Health and Human Services (HHS) for a portion of each qualified covered retiree's gross covered prescription drug costs ("qualified retiree prescription drug plan subsidy"). These qualified retiree prescription drug plan subsidies are excludable from the taxpayer's (plan sponsor's) gross income for regular income tax and alternative minimum tax (AMT) purposes. For tax years beginning before 2013, a taxpayer may claim a business deduction for covered retiree prescription drug expenses, even though it excludes qualified retiree prescription drug plan subsidies allocable to those expenses. But for tax years beginning after Dec. 31, 2012, under

Code Sec. 139A, the amount otherwise allowable as a deduction for retiree prescription drug expenses will be reduced by the amount of the excludable subsidy payments received.

Fee on health plans. For each policy year ending after Sept. 30, 2012, each specified health insurance policy and each applicable self-insured health plan will have to pay a fee equal to the product of \$2 (\$1 for policy years ending during 2013) multiplied by the average number of lives covered under the policy. The issuer of the health insurance policy or the self-insured health plan sponsor is liable for and must pay the fee. (Code Sec. 4375, Code Sec. 4376, and Code Sec. 4377)

\$500,000 compensation deduction limit for health insurance issuers. For tax years beginning after Dec. 31, 2012, for services performed during that year, a covered health insurance provider isn't allowed a compensation deduction for an "applicable individual" (officers, employees, directors, and other workers or service providers such as consultants) in excess of \$500,000. (Code Sec. 162(m)(6)(A)) A complex rule may reach compensation attributable to services performed in a tax year beginning after Dec. 31, 2009.

Excise tax on medical device manufacturers. For sales after Dec. 31, 2012, a 2.3% excise tax applies under Code Sec. 4191 to sales of taxable medical devices intended for humans. The excise tax, paid by the manufacturer, producer, or importer of the device, won't apply to eyeglasses, contact lenses, hearing aids, and any other medical device determined by IRS to be of a type that is generally purchased by the general public at retail for individual use.

Tax Changes Taking Effect in 2014

Larger employers not offering affordable health insurance coverage must pay penalty. Under Code Sec. 4980H, for months beginning after Dec. 31, 2013, a large employer (generally, one with at least 50 full-time employees) that (1) doesn't offer health care coverage for all its full-time employees, (2) offers minimum essential coverage that is unaffordable (coverage with a premium required to be paid by the employee that is more than 9.5% of the employee's household income, as defined for purposes of certain premium tax credit rules), or (3) offers minimum essential coverage that consists of a plan under which the plan's share of the total allowed cost of benefits is less than 60%, must pay a penalty if any full-time employee is certified to the employer as having purchased health insurance through a state exchange with respect to which a tax credit or cost-sharing reduction is allowed or paid to the employee.

Individuals not carrying health insurance face a penalty. For tax years beginning after Dec. 31, 2013, nonexempt U.S. citizens and legal residents must pay a penalty if they do not maintain minimum essential coverage, which includes government sponsored programs (e.g., Medicare, Medicaid, Children's Health Insurance Program), eligible employer-sponsored plans, plans in the individual market, certain grandfathered group health plans and other coverage as recognized by HHS in coordination with IRS. (Code Sec. 5000A) There are a number of exceptions, such as one for certain lower-income individuals.

Some employers must offer "free choice" vouchers for basic coverage. Effective for periods after Dec. 31, 2013, employers offering minimum essential coverage through an eligible employer-sponsored plan and paying a portion of that coverage must provide qualified

employees with a “free choice” voucher whose value can be applied to purchase of a health plan through a Insurance Exchange. (Code Sec. 139D) The employer treats the free choice voucher as an amount for compensation for personal services actually rendered. (Code Sec. 162(a)) Briefly, qualified employees are those who do not participate in the employer sponsored plan; whose required contribution for employer sponsored minimum essential coverage (if they did participate in the plan) exceeds 8%, but does not exceed 9.8% of household income; and whose total household income does not exceed 400% of the poverty line for the family.

Refundable tax credit for low- or moderate-income families buying certain health insurance. For tax years ending after Dec. 31, 2013, a new refundable tax credit (the “premium assistance credit”) under Code Sec. 36B applies to qualifying taxpayers who get health insurance coverage by enrolling in a qualified health plan through a State-established American Health Benefit Exchange.

“Qualified health plans” may be offered through cafeteria plans by “qualified employers.” For tax years beginning after Dec. 31, 2013, a reimbursement (or direct payment) for the premiums for coverage under any “qualified health plan” through a health insurance Exchange is a qualified benefit under a cafeteria plan if the employer is a qualified employer (generally, smaller businesses). (Code Sec. 125(f)(3)(B)) In very broad terms, a qualified health plan is one that meets certain certification requirements, provides “an essential health benefits package,” and is offered by an insurer meeting detailed requirements. And a health insurance “Exchange” is a federally supervised marketplace for health insurance policies meeting specific eligibility and benefit criteria, to be made available not later than Jan. 1, 2014, to qualifying individuals and employer groups of graduated sizes.

New information reporting of employer provided health coverage. For periods beginning after Dec. 31, 2013, new information reporting and related statement obligations apply under Code Sec. 6056 for (1) certain applicable large employers required to offer their full-time employees and their dependents the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan and (2) offering employers (those offering minimum essential coverage to employees and paying any portion of the such coverage, but only if the required employer contribution of any employee exceeds 8% of the employee's wages).

Excise tax on health insurance providers. For calendar years beginning after Dec. 31, 2013, an annual fee applies to health insurance providers. The aggregate annual flat fee for the industry (e.g., \$8 billion for 2014) will be allocated based on a health provider's market share of net premiums written for a U.S. health risk for calendar years beginning after Dec. 31, 2012. The fee will not apply to companies whose net premiums written are \$25 million or less. For purposes of the fee, health insurance does not include: coverage only for a specified disease or illness; hospital indemnity or other fixed indemnity insurance; insurance for long-term care; or any Medicare supplemental health insurance. (PPACA Sec. 9010, as amended by HCERA Sec. 10905, as further amended by HCERA Sec. 1406)

Accelerated estimated tax payments for large corporations. The estimated tax payment due for large corporations (assets of at least \$1 billion at the end of the previous tax year) in July, August, or September 2014 is increased from 157.75% to 173.50% of the payment otherwise

due, and the amount of the next required installment is appropriately reduced. (HCERA Sec. 1410)

Tax Change Taking Effect in 2018

Excise tax applies to high-cost employer provided health insurance coverage. For tax years beginning after Dec. 31, 2017, a 40% nondeductible excise tax will be levied on insurance companies and plan administrators for employer-sponsored health coverage to the extent that annual premiums exceed \$10,200 for single coverage and \$27,500 for family coverage. (Code Sec. 4980I) An additional threshold amount of \$1,650 for single coverage and \$3,450 for family coverage will apply for retired individuals age 55 and older and for plans that cover employees engaged in high risk professions.