

# Health Care Reform

## for Employers and Advisors



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## *What's New in the 4th Qtr. 2015 Edition*

This What's New section highlights the changes made in the last quarter to the *Health Care Reform for Employers and Advisors* guidebook—the authoritative guidebook for employers, administrators, and advisors.

Also see the 4th Qtr. 2015 *Current Developments* newsletter, which can be accessed under the Bookmarks tab. The *Current Developments* newsletter summarizes important legal developments that occurred during the quarter.

- **Section V—Which Plans and Insurers Must Comply With the PHSA Mandates?**
  - V.C—*What Is a Group Health Plan?* We note recent final agency regulations, which affirm that individual policy arrangements may run afoul of the prohibition on annual dollar limits and the requirement to provide first-dollar coverage for preventive services.
  - V.F—*Excepted Benefits: Certain Health FSAs, Dental, Vision, and Others.* In this subsection, we have added a text box about agency regulations that would allow nonexcepted health FSAs to be integrated (in the same manner as HRAs) with other coverage to comply with the preventive services requirements. There is also discussion on a recent federal district court ruling that enjoined HHS from enforcing a regulation requiring applicants for individual fixed indemnity policies to attest to having other minimum essential coverage.
- **Section VI—Grandfathered Health Plans.** We note the issuance of final regulations relating to grandfathered plans (effective for plan years beginning on or after January 1, 2017), which incorporate intervening agency guidance and provide some clarifications. We will include further coverage of this development in future updates.
- **Section IX—Lifetime, Annual, and Cost-Sharing Limits.**
  - IX.A—*Lifetime and Annual Dollar Limits.* We have updated this subsection throughout for the final regulations on the prohibition on lifetime and annual dollar limits, including the scope of arrangements (in addition to HRAs) that can be integrated with other group health coverage.
  - IX.B—*Cost-Sharing Limits.* We indicate the 2017 maximum annual limitation on cost-sharing proposed by HHS. And we've added a new text box on best practices for reference-based pricing.
- **Section X—Preexisting Condition Exclusions, Waiting Periods, and Rescissions.**
  - X.B—*Prohibition on Preexisting Condition Exclusions.* This subsection has been updated for final regulations, which adopt previous guidance on preexisting condition exclusions.
  - X.D—*Prohibition on Rescissions.* We have incorporated the final regulations relating to rescission of coverage, which incorporate previous guidance providing that the prohibition on rescissions is not violated if a plan retroactively terminates coverage due to a failure to pay required contributions (including COBRA premiums).
- **Section XI—Dependent Coverage for Adult Children.** We have updated this Section to note the issuance of final regulations relating to the age 26 mandate, and to highlight their prohibition of eligibility provisions that require participants to live, work, or reside in an HMO's service area or other network service area. We also streamlined our coverage to remove details on prior transition rules.
- **Section XII—Patient Protections, Preventive Health Services, and Clinical Trials.**
  - XII.B—*Patient Protections.* We have updated for final regulations on patient protections, which contain new clarifications—including when and how “balance billing” is permitted for out-of-network emergency care, and whether emergency care has to be sought within a specific timeframe.

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- XII.C—*Coverage of Preventive Health Services*. We have updated our coverage for the agencies' issuance of FAQ guidance addressing a variety of preventive services, including lactation counseling and equipment. And we've indicated that the U.S. Supreme Court has agreed to review several contraceptive coverage cases challenging the regulatory accommodation process.
- **Section XIV—Insurance Mandates.**
  - XIV.A—*Introduction and Understanding Small and Large Group Markets*. In this subsection, we have updated for the recent enactment of the Protecting Affordable Coverage for Employees (PACE) Act that amends the "small employer" definition for purposes of health care reform's insurance market provisions. In addition, we cover CMS FAQs that explain the impact of the legislation, including the process by which states may elect to expand this definition.
- **Section XV—Appeals Process and External Review Requirements.** We note the issuance of final regulations for appeals and external review requirements (effective for plan years beginning on or after January 1, 2017), which incorporate intervening agency guidance and provide some clarifications. We will include further coverage of this development in future updates.
- **Section XXI—Exchanges, Qualified Health Plans (QHPs), and CO-OPs.**
  - XXI.B—*Individuals and Employers Eligible for the Exchange*. We have revised the discussion relating to the definitions of "small employer" and "large employer" based on amendments in recently enacted legislation, as well as related CMS FAQs. And we cover FAQ guidance on Exchange notices to employers relating to advance payment of premium tax credits.
  - XXI.D—*Small Business Health Options Program (SHOP)*. In this subsection, we explain how the revised definition of "small employer" limits employer size for participation in the SHOP Exchanges. In addition, there is coverage of CMS FAQs regarding SHOP eligibility, including how an insurer should proceed if it believes that an employer group with too many employees has inappropriately enrolled in the SHOP. We have also updated for FAQ guidance, which confirms that employers in all states must offer "employee choice" in the SHOP for plan years beginning on or after January 1, 2016.
- **Section XXVI—Small Business Health Care Tax Credit.**
  - XXVI.H—*How Is the Credit Amount Determined?* We have updated for the average annual wage level at which the tax credit will begin to phase out for eligible small employers and the maximum average annual wages to qualify for the credit as an "eligible small employer" for 2016.
  - XXVI.I—*How Is the Tax Credit Claimed?* We have updated this subsection for the fiscal year 2016 reduction in the tax credit applicable to tax-exempt eligible small employers as a result of the federal sequestration.
- **Section XXVIII—Shared Responsibility for Employers (Play or Pay Penalty Tax).**
  - XXVIII.G—*Documentation and Recordkeeping for Offers of Coverage*. In this brand-new subsection, we explain the importance of maintaining records relating to offers of coverage to demonstrate compliance with Code § 4980H.
  - XXVIII.H—*Certification of Premium Tax Credit and Employer's Payment of Penalties*. In this subsection, we include details from CMS FAQ guidance explaining how Exchanges will phase in the notice program for informing employers when one or more of their employees receive an advance payment of premium tax credits. And we indicate that HHS has proposed to only require this notice if an employee actually enrolls in coverage with advance payment of tax credits.
  - XXVIII.I—*Penalty Tax Issues in Mergers and Acquisitions*. In another brand-new subsection, we raise important considerations affecting Code § 4980H compliance in connection with corporate merger and acquisition transactions. Although there is currently very little guidance in this area, we offer some preliminary insight to help parties make reasoned judgments in connection with corporate transactions.
- **Section XXIX—Shared Responsibility for Individuals (Play or Pay Penalty Tax).**
  - XXIX.F—*Premium Tax Credits for Lower-Income Individuals*. This subsection reflects the limitations on the tax for excess advance credit payments that will apply for taxable years beginning in 2016, as announced in Rev. Proc. 2015-53.
- **Section XXX—Tax on High-Cost Health Coverage.** You will find further insight on IRS proposals on implementing the so-called "Cadillac tax"—including proposed special rules for account-based plans (e.g., HRAs and health FSAs). And we've added a new subsection K ("Planning and Action Items") to help employers and advisors assess the potential impact of this excise tax (expected to go into effect starting in 2018) and plan their potential strategies.
- **Section XXXI—Automatic Enrollment.** We indicate that the automatic enrollment provision was repealed under the bipartisan budget legislation passed by Congress in November 2015.
- **Section XXXV—Special Issues for FSAs, HRAs, HSAs, and Cafeteria Plans (Including Simple Cafeteria Plans).**
  - XXXV.E—*Simple Cafeteria Plans*. This subsection has been updated to reflect changes in the limits that apply when determining which employees are HCEs and Keys under the simple cafeteria plan rules. We have also added a reminder that health FSAs generally must qualify as excepted benefits in order to comply with health care reform requirements. Thus, if a health FSA is offered under a simple cafeteria plan, care should be taken to

ensure that employer contributions may not be applied to the health FSA in amounts that would exceed the Maximum Benefit Condition (discussed in V.F).

• **Section XXXVI—Reporting, Fees, and Required Payments.**

- XXXVI.B—*W-2 Reporting: Cost of Employer-Sponsored Health Coverage.* This subsection reflects the IRS's indication that it plans to modify its current approach for W-2 reporting relating to excess reimbursements under a self-insured discriminatory plan.
- XXXVI.C—*Information Reporting of Minimum Essential Coverage (Insurers and Employers That Self-Insure).* We've noted revisions to IRS Form 8809, used to request an extension of time to file the returns under Code § 6055. We also indicate that the IRS has finalized Publication 5223 (which covers the requirements for preparing acceptable substitutes of Forms 1094-B and 1095-B) and released draft publications that provide an early look at electronic filing for tax year 2015. New examples have been added to illustrate the rules for obtaining consent in connection with electronic furnishing of individual statements, and we've updated for the increase in penalties for compliance failures related to information returns and payee statements.
- XXXVI.D—*Information Reporting of Employer-Sponsored Coverage (Applicable Large Employers).* We've noted revisions to IRS Form 8809, used to request an extension of time to file the returns under Code § 6056. We also indicate that the IRS has finalized Publication 5223 (which covers the requirements for preparing acceptable substitutes of Forms 1094-C and 1095-C) and released draft publications that provide an early look at electronic filing for tax year 2015. New examples have been added to illustrate the rules for obtaining consent in connection with electronic furnishing of individual statements, and we've updated for the increase in penalties for compliance failures related to information returns and payee statements.
- XXXVI.H—*Patient-Centered Outcomes Research (PCOR) Fees.* This subsection reflects the adjusted applicable dollar amount for PCOR fees for plan and policy years ending on or after October 1, 2015 and before October 1, 2016, announced in IRS Notice 2015-60. And we've added a text box to discuss whether PCOR fees may be included in the COBRA applicable premium.
- XXXVI.I—*Required Contributions Toward Reinsurance Payments.* We've revised our discussion for HHS's release of the 2015 reinsurance contributions form and the applicable payment due dates. In addition, we have updated for related FAQ guidance issued by CMS. And we have highlighted a proposed change, which would authorize HHS to audit TPAs, ASOs, and other third parties that assisted contributing entities (such as self-insured health plans) with calculating or submitting their reinsurance contributions for 2014–2016.

• We have also made changes to **Appendix Tab 5.**

- *Sample Notice of Final External Review Decision.* We have added a new sample document of the notice of final external review decision, which must be provided by an independent review organization that performs external review services for a plan. This sample notice incorporates and expands upon a model notice issued by the DOL and HHS. A related guide provides important background information about this notice, which like other sample documents, should not be used as a form document but rather as a starting point for the development of tailored notices.

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**Substantive Changes to the Appendix:**

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| <ul style="list-style-type: none"><li>• <b>Tab 1—Statutes</b><ul style="list-style-type: none"><li>– Updated TOC</li><li>– Updated PHSA § 2791(e)</li><li>– Removed repealed FLSA § 18A</li></ul></li><li>• <b>Tab 2—Regulations</b><ul style="list-style-type: none"><li>– Updated TOC</li></ul></li></ul> | <ul style="list-style-type: none"><li>• <b>Tab 3—Other Guidance</b><ul style="list-style-type: none"><li>– Updated TOC</li></ul></li><li>• <b>Tab 4—Resources</b><ul style="list-style-type: none"><li>– Updated TOC</li></ul></li><li>• <b>Tab 5—Sample Documents</b><ul style="list-style-type: none"><li>– Updated TOC</li><li>– Updated sample document</li></ul></li></ul> |
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**Lots More to Come!** From the feedback we've received, we know that our manuals are the premier group health plans resources in the country. But here at EBIA we're not satisfied. We are constantly striving to make the manual even better. In upcoming editions, look forward to complete coverage of all legal developments affecting health care reform, and to our further analysis of existing law, with more examples and Q/As, etc.

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