

Health Care Reform (“PPACA”) Legal Developments 2014 Year End Update

1. Non-grandfathered plans must provide certain **preventive care benefits** without cost-sharing.¹ These requirements received considerable attention in 2014, both from the federal courts and the IRS, DOL, and HHS. Key updates and changes to these requirements in 2014 include:
 - Guidance establishing a compliance “safe harbor” that plans may follow to comply with the requirement that they provide **smoking cessation benefits**. Read more at: <http://www.songmondress.com/Articles/Updated-Guidance-on-Preventive-Care-Requirements.shtml>.²
 - Clarification that for plan years beginning on or after September 24, 2014, plans must cover certain medications to reduce the risk of breast cancer for women at increased risk, such as tamoxifen and raloxifene.³
 - The USPTF added several **new preventive care recommendations**, which will require plans to cover additional items and services for plan years beginning in 2015 or 2016. These include: (1) new screening and preventive medication coverage for certain pregnant women⁴; (2) fluoride varnish and supplements for young children⁵; (3) screening for Hepatitis B in high-risk adolescents and adults⁶; (4) One-time screening for abdominal aortic aneurysm in men aged 65 to 75 years who have ever smoked⁷; (5) behavioral counseling interventions to promote healthy lifestyles for adults with high risk of cardiovascular disease⁸; (6) behavioral counseling for sexually active adolescents and adults who are at increased risk for sexually transmitted infections⁹; and (7) chlamydia and gonorrhea screening for certain sexually active women.¹⁰
 - Plans must provide **contraceptive coverage**. However, this was challenged by several organizations on religious grounds. On June 30, 2014, the Supreme Court in *Burwell v. Hobby Lobby Stores, Incorporated*¹¹ held that the contraceptive coverage mandate, when applied to “closely-held” for-profit companies, violated the Religious Freedom Restoration Act when providing such coverage would be contrary to the owners’ religious beliefs. On July 17, 2014, the Agencies stated that ceasing to provide contraceptive coverage mid-plan year is a material reduction in benefits requiring expedited notice to participants and beneficiaries.¹² On August 27, 2014, the IRS issued proposed regulations amending the definition of an “eligible organization” that may avail itself of one of the religion-based accommodations with respect to contraceptive coverage.¹³

2. PPACA's **play or pay excise tax** rules were originally scheduled to go into effect on January 1, 2014. However, in July 2013, the IRS issued guidance (IRS Notice 2013-45) delaying their effective date until January 1, 2015. In February 2014, the IRS issued final pay or play regulations, which provide comprehensive guidance implementing these rules. The final regulations address which employers may be subject to these taxes, measurement methods for determining full-time employee status, affordability/minimum value (and applicable safe harbors), and more. The final regulations retain the January 1, 2015 effective date, but include several transitional rules that further delay the rules' applicability in certain situations. For example, employers that maintain fiscal year plans are excused from compliance with the Play or Pay rules until the start of their 2015 plan years, if certain requirements are met. And employers that contribute to multiemployer plans which offer affordable, minimum value coverage to employees who satisfy the plan's eligibility rules (and their dependents) are deemed to have offered affordable, minimum value coverage to such employees for purposes of the Play or Pay rules. Read more at: <http://www.songmondress.com/Articles/Health-Care-Reform-Summary-of-Final-Play-or-Pay-Regulations.shtml>.¹⁴
3. Building on these February 2014 final regulations, the IRS has proposed an **approach to applying the "look back" measurement method** used under the "play or pay" excise tax rules in cases where the measurement period for a particular employee changes (for example, where the employee transfers to a new position with the employer for which a different measurement period applies).¹⁵ Employers may rely on this proposed approach until further guidance is issued, and at least through 2016.
4. In March 2014, the IRS issued final regulations on **minimum essential coverage ("MEC") reporting** under Code §§ 6055 (reporting on enrollment in MEC) and 6056 (reporting on whether an applicable large employer offered MEC to full-time employees), finalizing regulations originally proposed in September 2013.¹⁶ The final regulations are effective for calendar years beginning on or after January 1, 2015, and reports issued in January 2016. In December 2014, the IRS published two sets of FAQs providing additional guidance on these reporting requirements.¹⁷
5. The IRS, DOL, and HHS issued final regulations on PPACA's rule prohibiting plans from imposing a **waiting period for health coverage that exceeds 90 days**, which are effective for plan years beginning on or after January 1, 2015.¹⁸ At the same time, the Agencies issued separate proposed regulations regarding "orientation periods" under the 90-day waiting period limitations,¹⁹ and final regulations clarifying the maximum length of any permissible orientation period were issued in June 2014.²⁰ Read more at: <http://www.songmondress.com/Articles/HEALTH-CARE-REFORM-NEW-90-DAY-WAITING-PERIOD-REGULATIONS-ISSUED.shtml>.
6. After December 31, 2014, plans no longer need to provide HIPAA **certificates of creditable coverage**.²¹
7. In November 2014, the Supreme Court granted review in *King v. Burwell*, one of several cases alleging that while IRS **premium tax credits and cost-sharing subsidies** are available for coverage purchased on a state-based insurance exchange, such tax credits and

subsidies are not available for coverage purchased on the Federal Exchange.²² We expect a decision by June 2015.

8. Most health plans were originally required to obtain a **health plan identifier (“HPID”)** by November 5, 2014. At the last minute, HHS indefinitely delayed enforcement of the HPID requirement.²³ Also, the ICD-10 (the World Health Organization’s set of diagnostic and medical procedure codes) compliance deadline has been delayed until October 1, 2015.²⁴
9. PPACA’s **out-of-pocket maximum in 2015** is \$6,600 for self-only coverage, and \$13,200 for coverage other than self-only coverage.²⁵ The Code § 223 maximum out of pocket limit for HSAs (and high-deductible health plans (“HDHPs”)) is \$6,450 for self-only coverage, and \$12,900 for family coverage.²⁶ The Agencies have also provided guidance on the application of PPACA’s out-of-pocket maximum rules to plans utilizing reference-based pricing (or similar provider network designs).²⁷
10. Enrollment counts for the 2014 **transitional reinsurance (“TR”) contribution** were due by December 5, 2014. The first installment of the 2014 fee will be due in January 2015. The agencies have also clarified that the **TR contribution is deductible** as an ordinary and necessary business expense.²⁸ The TR contribution is \$63 per covered life for 2014, and \$44 per covered life for 2015. Proposed regulations would set the TR contribution for 2016 (the last year for which the TR contribution is owed) at \$27 per covered life.
11. The **Patient Centered Outcomes Research Institute (“PCORI”) Fee** increased to \$2.08 per covered life for plan years ending after September 30, 2014 and before October 1, 2015. The next PCORI fee must be paid by July 31, 2015.²⁹
12. In September, the IRS issued guidance allowing for **two new mid-year cafeteria plan election changes**. The first would allow mid-year election changes by employees whose hours of service average less than 30 per week. The second involves employees who wish to cease participation in the employer’s group health plan and instead purchase Exchange coverage.³⁰ Plan sponsors may choose to add these changes to their plans, or not.
13. In December 2014, the President signed into law the **“Expatriate Health Coverage Clarification Act of 2014” (“EHCCA”)** which exempts expatriate health coverage and insurance meeting certain requirements from many of PPACA’s mandates.³¹ Before EHCCA was enacted, HHS issued proposed regulations extending the exemption from transitional reinsurance contributions to self-insured expatriate health coverage for the 2015 and 2016 benefit years.³²
14. The government has continued to emphasize that **employers will owe penalties if they reimburse their employees for the cost of individual insurance coverage**, instead of providing employer-sponsored group health coverage, whether reimbursements are pre-tax or after-tax.³³
15. The government has taken the position that an employer may not offer employees with high claims risks cash, if the employee does not enroll in the employer’s health plan.³⁴
16. In 2012, the Agencies issued final regulations implementing PPACA’s **summary of benefits and coverage (“SBC”) requirements**.³⁵ Since then, the Agencies have provided

additional guidance in the form of FAQs.³⁶ In December 2014, the Agencies issued proposed regulations incorporating much of this guidance,³⁷ and revising other aspects of the SBC requirements. At the same time, the Agencies issued revised SBC templates and instructions consistent with the proposed regulations.³⁸

17. PPACA requires that health plans obtain two certifications that they comply with the **HIPAA electronic transactions rules**. In January 2014, HHS issued proposed regulations on the first HIPAA certification.³⁹ If the proposed regulations are finalized without change, health plans will generally need to submit the first certification to HHS by the end of 2015.
18. On November 4, 2014, HHS and the IRS issued Notice 2014-69, which states that plans which do not provide substantial coverage for inpatient hospitalization services or for physician services (sometimes referred to as “**skinny plans**”) do not provide minimum value for purposes of PPACA’s premium tax credit and employer pay or pay excise taxes.
19. In October 2013, the IRS modified its “**use-it-or-lose-it**” rules for health FSAs to allow up to \$500 of unused health FSA funds remaining at the end of a plan year to be carried over to the subsequent plan year.⁴⁰ In May 2014, the Agencies clarified that amounts carried forward under the modified “use-it-or-lose-it” rule should not be taken into account in determining whether the health FSA qualifies as an excepted benefit.⁴¹

From all of us here at Song Mondress, your employee benefits law firm.

Not intended as legal advice.

¹ All of the USPSTF’s recommendation statements are available at <http://www.uspreventiveservicestaskforce.org/Page/Name/uspstf-a-and-b-recommendations/>. Plans must comply with new and revised recommendations starting with the first plan year that begins one or after the date that is one year after the new or revised recommendation is first published.

² See also FAQs about Affordable Care Act Implementation (Part XIX), Q&A-5, available at <http://www.dol.gov/ebsa/faqs/faq-aca19.html>.

³ FAQs about Affordable Care Act Implementation (Part XVIII), Q&A-1, available at <http://www.dol.gov/ebsa/faqs/faq-aca18.html>.

⁴ See <http://www.uspreventiveservicestaskforce.org/Page/Document/RecommendationStatementFinal/gestational-diabetes-mellitus-screening> and <http://www.uspreventiveservicestaskforce.org/Page/Document/RecommendationStatementFinal/low-dose-aspirin-use-for-the-prevention-of-morbidity-and-mortality-from-preeclampsia-preventive-medication>.

⁵ See <http://www.uspreventiveservicestaskforce.org/Page/Document/RecommendationStatementFinal/dental-caries-in-children-from-birth-through-age-5-years-screening>.

⁶ See <http://www.uspreventiveservicestaskforce.org/Page/Document/RecommendationStatementFinal/hepatitis-b-virus-infection-screening-2014>.

⁷ See <http://www.uspreventiveservicestaskforce.org/Page/Document/RecommendationStatementFinal/abdominal-aortic-aneurysm-screening>.

⁸ See <http://www.uspreventiveservicestaskforce.org/Page/Document/RecommendationStatementFinal/healthy-diet-and-physical-activity-counseling-adults-with-high-risk-of-cvd>.

⁹ See <http://www.uspreventiveservicestaskforce.org/Page/Document/RecommendationStatementFinal/sexually-transmitted-infections-behavioral-counseling1>.

¹⁰ See <http://www.uspreventiveservicestaskforce.org/Page/Document/RecommendationStatementFinal/chlamydia-and-gonorrhea-screening>.

¹¹ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2785 (2014).

¹² FAQs about Affordable Care Act Implementation (Part XX), Q&A-1, available at <http://www.dol.gov/ebsa/faqs/faq-aca20.html>.

¹³ 79 Fed. Reg. 51118 (Aug. 27, 2014).

¹⁴ An IRS FAQ, “Questions and Answers on Employer Shared Responsibility Provisions Under the Affordable Care Act,” is available at <http://www.irs.gov/Affordable-Care-Act/Employers/Questions-and-Answers-on-Employer-Shared-Responsibility-Provisions-Under-the-Affordable-Care-Act>.

¹⁵ IRS Notice 2014-49. In general terms, under the “look-back” method, an employee is treated as full-time (or not) for pay or pay purposes during a particular period (called a “stability period”) based on whether or not they averaged 30 or more hours/week during a prior period (called a “measurement period”).

¹⁶ 79 Fed. Reg. 13220 (Mar. 10, 2014) and 79 Fed. Reg. 13231 (Mar. 10, 2014).

¹⁷ “Questions and Answers on Information Reporting by Health Coverage Providers (Section 6055),” available at <http://www.irs.gov/Affordable-Care-Act/Questions-and-Answers-on-Information-Reporting-by-Health-Coverage-Providers-Section-6055>, and “Questions and Answers on Reporting of Offers of Health Insurance Coverage by Employers (Section 6056),” available at <http://www.irs.gov/Affordable-Care-Act/Employers/Questions-and-Answers-on-Reporting-of-Offers-of-Health-Insurance-Coverage-by-Employers-Section-6056>.

¹⁸ 79 Fed. Reg. 10296 (Feb. 24, 2014).

¹⁹ 79 Fed. Reg. 10320 (Feb. 24, 2014).

²⁰ 79 Fed. Reg. 35942 (June 25, 2014).

²¹ 49 Fed. Reg. 10296, 10309 (Feb. 24, 2014).

²² *King v. Burwell*, 759 F.3d 358 (4th Cir.) cert. granted, 135 S. Ct. 475 (2014).

²³ See <http://www.cms.gov/Regulations-and-Guidance/HIPAA-Administrative-Simplification/Affordable-Care-Act/Health-Plan-Identifier.html>.

²⁴ See CMS press release, *Deadline for ICD-10 allows health care industry ample time to prepare for change*, available at <http://cms.hhs.gov/Newsroom/MediaReleaseDatabase/Press-releases/2014-Press-releases-items/2014-07-31.html>.

²⁵ See PHSA § 2707(b); 79 Fed. Reg. 30240 (May 27, 2014); see also FAQs about Affordable Care Act Implementation (Part XXI), available at <http://www.dol.gov/ebsa/faqs/faq-aca21.html>.

²⁶ See Rev. Proc. 2014-30. PPACA’s out-of-pocket maximum is initially based on the Code § 223 limits for HDHPs, and for plan years beginning in 2014, these two limits were the same. However, for later years, HHS and IRS use different measures to adjust the Code § 223 limits, producing the disparate limits for 2015 identified here. The IRS has informally stated that plans subject to both PPACA’s out-of-pocket maximum and the Code § 223 limitation on out-of-pocket maximums (such as HDHPs) must comply with the lower limits. See ABA JCEB 2013 Q&A with the IRS, Q&A-1, available at http://www.americanbar.org/content/dam/aba/events/employee_benefits/2013_irs_qa.authcheckdam.pdf.

²⁷ FAQs about Affordable Care Act Implementation (Part XXI), available at <http://www.dol.gov/ebsa/faqs/faq-aca21.html>.

²⁸ See <http://www.irs.gov/uac/Newsroom/ACA-Section-1341-Transitional-Reinsurance-Program-FAQs>.

²⁹ See <http://www.irs.gov/uac/Patient-Centered-Outcomes-Research-Trust-Fund-Fee:-Questions-and-Answers>.

³⁰ IRS Notice 2014-55.

³¹ Available at <https://www.congress.gov/bill/113th-congress/house-bill/83/text>. EHCCA is part of the Consolidated and Further Continuing Appropriations Act of 2015 (informally referred to as the “CRomnibus”).

³² 79 Fed. Reg. 70674 (Nov. 26, 2014).

³³ FAQs about Affordable Care Act Implementation (Part XXII), Q&A-1, available at <http://www.dol.gov/ebsa/faqs/faq-aca22.html>. Read more at: <http://www.songmondress.com/Articles/January-2014-Health-Care-Reform-PPACA-Legal-Developments-2013-Year-End-Update.shtml>.

³⁴ *Id.* at Q&A-2.

³⁵ 79 Fed. Reg. 78578 (Dec. 30, 2014).

³⁶ See Affordable Care Act Implementation FAQs Parts VII, VIII, IX, X, and XIX (Q&As 7, 8), all of which are available at <http://www.dol.gov/ebsa/healthreform/regulations/acaimplementationfaqs.html>.

³⁷ 79 Fed. Reg. 78578 (Dec. 30, 2014).

³⁸ See <http://cciio.cms.gov> and <http://www.dol.gov/ebsa/healthreform/regulations/summaryofbenefits.html>.

³⁹ 79 Fed. Reg. 298 (Jan. 2, 2014).

⁴⁰ IRS Notice 2013-71.

⁴¹ FAQs about Affordable Care Act Implementation (Part XIX), Q&A-6, available at <http://www.dol.gov/ebsa/faqs/faq-aca19.html>.