



## **IMPLEMENTATION TIME LINE** FOR HEALTH CARE REFORM



**Catherine E. Shuck**

“Although there is still plenty of room for disagreement as to the merits of the various reform provisions in the Act, one thing is certain: the role of employers in providing health care is about to undergo some radical changes.”

In what has been described as the most sweeping social change legislation in decades, President Obama signed the Patient Protection and Affordable Care Act, H.R. 3590 / P.L. 111-148 on March 23, 2010, which was amended a week later by the Health Care and Education Reconciliation Act of 2010 (collectively, the “Act”). Although there is still plenty of room for disagreement as to the merits of the various reform provisions in the Act, one thing is certain: the role of employers in providing health care is about to undergo some radical changes.

The Act’s primary purpose is to extend affordable health insurance to the majority of the population. To do so, the Act requires individuals to obtain coverage or pay a penalty, and requires almost all employers to provide coverage or pay a penalty. The Act also restricts the ability of insurance providers to deny, limit or cancel coverage. Minimum benefits, maximum cost-sharing amounts, and overall affordability will be set by regulation, with some exceptions for existing “grandfathered” plans. Finally, the Act directs states to create Exchanges for purchase of individual and group health insurance, but also permits insurance to be sold outside of the Exchanges. Individuals who do not have access to employer-provided coverage and who cannot afford private coverage on their own (generally those whose family incomes fall between 133% and 400% of the federal poverty level) will be eligible for premium credits and cost-sharing subsidies. Those with incomes below 133% of the federal poverty level will be insured through Medicaid; the Act also continues the CHIP program for children. Most of these substantive changes take effect in 2014.

The much-publicized “play or pay” rule requiring employers with fifty or more employees to offer coverage or pay a per-employee penalty likewise does not take effect until 2014, but many other requirements affecting employers take effect sooner. Following is a time line of effective dates for major provisions in the legislation pertaining to employers and employer-sponsored health care.

**Effective Immediately**

The following three amendments to the Fair Labor Standards Act, as well as the first of many amendments to the Tax Code, took effect upon passage of the Act:

**Breaks for Nursing Mothers.** Employers must provide reasonable unpaid breaks to nursing mothers of infants up to one year old to express breast milk. Employers must provide a location, other than a rest room, that is shielded from view and free from intrusion. Employers with fewer than 50 employees are exempted from the requirement if it would impose an “undue hardship” by causing the employer “significant difficulty or expense.”

**Private Right of Action for Employees.** Employers may not discriminate, discharge, or otherwise retaliate against employees who receive a tax credit or subsidy under the Act or who engage in whistle-blowing activity as to an employer’s or other entity’s violation of Title I of the Act (which contains the mandatory coverage provisions). The complaint procedures, burden of proof, and remedies available are those set forth in the Consumer Product Safety Improvement Act, and include a private right of action with costs and attorney’s fees available to a prevailing plaintiff.

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**Automatic Enrollment.** Employers with more than 200 full-time employees must automatically enroll new employees in one of the plans offered (subject to any waiting period). Additionally, employers must automatically continue the enrollment of existing employees. Employees may opt out, but must affirmatively choose to do so. Although the Act is silent as to when this provision takes effect—meaning that it is read as taking effect immediately—for practical purposes it will not take effect until DOL issues implementing regulations.

**Small Business Tax Credit.** The Act includes a small business tax credit for qualified small employers (generally no more than 25 employees) for contributions to purchase health insurance. The credit is up to 35 percent of the employer's contribution to provide health insurance for employees. The IRS began contacting small businesses in mid-April to publicize the credit.

### Effective Later in 2010

Although the Act contains a “grandfathering” provision excluding plans in existence on March 23, 2010 from many new requirements, the following requirements apply to all employer-sponsored plans unless otherwise noted:

**Elimination of Pre-Existing Condition Exclusions for Children.** Bars health insurance companies from imposing pre-existing condition exclusions on children's coverage. *Effective for plan years beginning on or after September 23, 2010 and applying to all plans. Elimination of pre-existing exclusions for all enrollees takes effect in 2014.*

**Extension of Coverage for Young Adults.** Requires any group health plan that provides dependent coverage for children to continue to make that coverage available until the child turns 26 years of age. Between 2010 and 2014, grandfathered plans (those in effect on March 23, 2010) are not required to cover an adult dependent if the dependent is eligible for other employer-sponsored coverage. *Effective for plan years beginning on or after September 23, 2010.*

**Elimination of Lifetime Limits.** Prohibits health insurers from imposing lifetime limits on total benefits available to a covered person. Some per-beneficiary limits will be permitted on specific covered benefits that are not “essential health benefits.” *Effective for plan years beginning on or after September 23, 2010 and applying to all plans.*

**Regulation of Annual Limits.** HHS will issue regulations setting a cap on annual limits that grandfathered plans may impose on essential health benefits. *Effective for plan years beginning on or after September 23, 2010 and applying to all plans. As of 2014, all annual limits will be prohibited.*

**Elimination of Rescissions.** Prohibits health insurers from rescinding existing health insurance policy when an enrollee gets sick as a way of avoiding covering the costs of the enrollee's health care. *Effective for plan years beginning on or after September 23, 2010 and applying to all plans.*

**Cost of Covering Early Retirees.** Creates a new temporary reinsurance program to help companies that provide early retiree health benefits for those ages 55-64 offset the expensive cost of that coverage. *Effective June 21, 2010.*

### 2011

**Reporting Health Coverage Costs on Form W-2.** Requires employers to disclose the value of the benefit provided by the employer for each employee's health insurance coverage on the employee's annual Form W-2. Note that the law does not provide for taxation of benefits; at this point, it is simply a reporting requirement. *Effective for tax years beginning after December 31, 2010.*

**Elimination of over-the-counter (OTC) drugs from flexible spending account (FSA) eligibility.** OTC drugs will no longer be eligible FSA expenses unless the employee has a prescription. *Effective January 1, 2011.*

**Cafeteria Plan Changes.** Creates a Simple Cafeteria Plan to provide a vehicle through which businesses with fewer than 100 employees can provide tax-free benefits to their employees. *Effective for tax years beginning after December 31, 2010.*

**Voluntary Options for Long-Term Care Insurance.** Creates a voluntary long term care insurance program to be financed by voluntary payroll deductions to provide benefits to adults who become disabled. *Effective January 1, 2011.*

## 2013

**Limitation on Health Flexible Savings Account Contributions.** Limits the amount an individual employee may contribute to a health FSA to \$2,500 per year, indexed by the CPI for subsequent years.

**Notification to Employees of Coverage Options.** Employers must provide written notice to employees of coverage options and consequences. *Effective March 1, 2013.*

**Elimination of Deduction for Employer Part D Subsidy.** Eliminates the deduction for the subsidy for employers who maintain prescription drug plans for their Medicare Part D eligible retirees.

## 2014

**Employers Required to Provide Coverage or Pay Penalty.** Employers with 50 or more full-time employees (defined as 30 or more hours per week) must offer health insurance coverage to their employees or pay an annual penalty of \$2,000 per full-time-equivalent employee for all full-time employees in excess of 30. (There is no penalty for employees who are fulfilling a health plan's waiting period.) The penalty only applies if at least one full-time employee receives a premium tax credit. For practical purposes, since 2014 also inaugurates the requirement that individuals obtain coverage or pay a penalty, it is anticipated that where an employer does not provide coverage, at least one of its employees would receive a premium tax credit, triggering the penalty. Additionally, as an incentive for employers to keep coverage affordable for employees, if an employer offers coverage but at least one full-time employee receives a premium tax credit, the employer is assessed a penalty of the lesser of \$3,000 for each employee receiving a credit or \$2,000 for each full-time employee.

**Limitation on Waiting Periods.** Waiting periods may not exceed 90 days. Large employers with waiting periods longer than 60 days must pay a \$600 penalty for each employee to whom the waiting period is applied.

**Regulation of Wellness Programs.** Increases the maximum incentive amount for employer-sponsored wellness programs, which reward employees for certain health outcomes and behaviors, from 20% to 30% of the COBRA cost of coverage, as long as participation is available to all similarly-situated individuals. Imposes regulations on programs that are based on "health status-related factors" as defined by the Act and to be further defined by HHS regulation.

**Elimination of Annual Limits.** Prohibits insurers from imposing annual limits on the amount of coverage an individual may receive.

**Small Business Tax Credits.** Implements the second phase of the small business tax credit for qualified small employers.

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## **KNOW YOUR ATTORNEY**

### **HEATHER N. THORNE**



HEATHER N. THORNE is an Associate Attorney in the Cookeville, Tennessee office of Wimberly Lawson Wright Daves & Jones, PLLC and

has been with the firm since 2006. She obtained her Bachelor of Science Degree in History from Tennessee Technological University in 2004 and her Doctor of Jurisprudence Degree from the Nashville School of Law in 2009. She was an Assistant Court Administrator and Research Assistant to Judge John Hudson. She is a member of the Tennessee Bar Association and the Nashville School of Law Legal Society.

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**THE 2010 LABOR  
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## Initial Steps for Employers

Many of the Act's most costly provisions either do not apply to, or have delayed application to, grandfathered plans. The Act defines a grandfathered plan as a group health plan that was in effect on March 23, 2010, the day the main provisions of the Act were signed. Employers therefore should proceed with caution when amending an existing plan so as not to jeopardize its grandfathered status. The Act provides that grandfathered status will not be lost by: (i) adding new employees and their families to the plan; (ii) allowing employees covered under the plan to add family members (provided the plan terms allowed for this dependent coverage on March 23, 2010); or (iii) renewing an insurance policy after March 23, 2010. Look for the definition of a grandfathered plan to be fleshed out further by regulation.

Even where an employer continues a grandfathered plan, to meet the January 1, 2011 deadline that will apply to employers with calendar-year plans, employers during the next few months will have to amend their healthcare plans to comply with the Act's requirements. These include extending coverage to employees' adult children up to age 26, eliminating most lifetime dollar limits and removing pre-existing condition exclusions, if any, for children up to age 19. Employers will also have to narrow allowed spending from flexible spending accounts to bar reimbursement for non-prescription, over-the-counter drugs.

## **LABOR BOARD** NOW HAS THREE UNION LAWYERS AND ONE REPUBLICAN



### **Gary W. Wright** .....

"This is a purely partisan move that will make a traditionally bi-partisan Labor Board an unbalanced agenda-driven panel."

Senate Minority Leader  
Mitch McConnell  
.....

On March 27, 2010, President Obama filled fifteen positions by recess appointments, including Democrats Craig Becker and Mark Pearce as members of the National Labor Relations Board (NLRB). Becker is by far the most controversial of the recess appointees having failed to win Senate confirmation in February when two Democrats joined Republicans to block a vote. Becker has been an Associate General Counsel for the Service Employees International Unions since 1990, and AFL-CIO Staff Counsel since 2002, and is a law professor who has written many controversial articles on labor and employment issues. Among other things, Becker has advocated that employers should not have "free speech" rights during union organizational campaigns and indeed should not play a role in the process of determining union representation. The other NLRB appointee, Pearce, is a partner with a Buffalo, N.Y., law firm who represents unions and employees in discrimination cases.

It is very significant that a third pending NLRB nominee, Republican Senate Staffer Brian Hayes, was not named to a recess appointment along with Becker and Pearce, thus leaving the NLRB with three Democrats, and only one Republican. The Senate Minority Leader Mitch McConnell, reacted in the following manner: "Additionally stunning is the Administration's decision to recess appoint two Democrat nominees to the NLRB and leave the Republican behind . . . . This is a purely partisan move that will make a traditionally bi-partisan Labor Board an unbalanced agenda-driven panel."

The recess appointments will last until the end of the 2011 Congressional session. The NLRB, which was designed to have five members, has been operating with just two members since the start of 2008. The U.S. Supreme Court recently held oral argument on a challenge to a legal authority to issue rulings with only two members.

## **UPCOMING 2010 SEMINARS**

- May 19, 2010 – Navigating the Minefield – Crossville, Crossville Housing Authority
- May 21, 2010 – 2010 Tennessee Employment Law and Legislation Symposium – Nashville, Sheraton Capitol Hill
- May 26, 2010 – 2010 Labor and Employment Law Conference – Morristown, Rose Center
- July 15, 2010 – Wimberly Lawson Annual Workers' Compensation – Nashville, Airport Marriott

Please visit our website, [www.wimberlylawson.com](http://www.wimberlylawson.com), for registration information.



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# TARGET OUT OF RANGE



## THE WIMBERLY LAWSON LABOR & EMPLOYMENT LAW UPDATE

Knoxville Marriott - Knoxville, Tennessee - November 18 – 19, 2010

**COST:** Early, Early Bird (registration AND payment received by June 18, 2010)

\$289 per person

\$269 for each additional person from same company

\$229 for eight or more from same company

Early Bird (registration AND payment received by October 15, 2010)

\$299 per person

\$289 for each additional person from same company

\$239 for eight or more from same company

Registration and payment received AFTER October 15, 2010

\$339 per person

\$329 for each additional person from same company

\$299 for eight or more from same company



The use of this seal is not an endorsement by the HR Certification Institute of the quality of the program. It means that this program has met the HR Certification Institute's criteria to be pre-approved for recertification credit.

### REGISTRATION INCLUDES:

Seminar (1½ days), materials, two continental breakfasts, lunch and evening reception on Thursday

**CANCELLATION POLICY:** 50% cancellation fee will be incurred for cancellations after October 29, 2010. Cancellations made after November 10, 2010 will forfeit registration fee (registrants will receive the conference materials post-seminar).

#### FIVE WAYS TO REGISTER:

1. **Mail to:** Bernice Houle  
Wimberly Lawson Wright  
Daves & Jones, PLLC  
P.O. Box 2231  
Knoxville, TN 37901-2231
2. **Fax to:** 865-546-1001
3. **Email to:** [bhoul@wimberlylawson.com](mailto:bhoule@wimberlylawson.com)
4. **Via website:** [www.wimberlylawson.com](http://www.wimberlylawson.com)
5. **Phone:** 865-546-1000

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Number attending reception \_\_\_\_\_

*This program will be submitted for HRCI recertification credit hours and Tennessee CLE general credit hours.*

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## TARGET OUT OF RANGE



Dear Clients and Friends:

Our Annual Conference is truly the high point of the year for us -- a time to gather with friends and discuss important, contemporary employment issues. **PLEASE PLAN NOW TO JOIN US.**

Our day and a half program covers important legal decisions and societal trends affecting employment. Topics are carefully selected to address the concerns of all employers and to give you an opportunity to select from a wide array of topics dealt with in detail. Some of the twenty-five or more topics are:

- Impact of Healthcare Reform on Employers
- FMLA Intermittent Leave Regs and How They Affect You
- Social Media in the Workplace
- COBRA Expansion
- 21<sup>st</sup> Century Contracts and Agreements
- Avoiding Issues Later with Effective Hiring Now
- When is Mediation Best?
- Avoid Top Wage-Hour Violations
- Sweatpants, Tattoos and Body Piercings – Issues and What You Need to Know
- Violence in the Workplace
- Latest Developments in Workers Compensation
- Understanding the EEOC – EEOC Officials Will Comprise Panel

Join us in Knoxville on November 18 and 19! We promise you an informative, but light-hearted, thorough and practical journey through today's workplace issues.

Hope to see you there!

Respectfully,

Ronald G. Daves  
Managing Member