EMPLOYER'S GUIDE TO

2015

HEALTH CARE REFORM

Brian M. Pinheiro
Jean C. Hemphill
Jonathan M. Calpas
Kurt R. Anderson

Ballard Spahr LLP

Wolters Kluwer

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Employer's Guide to Health Care Reform

2015 Edition

by Brian M. Pinheiro, Jean C. Hemphill, Jonathan M. Calpas, and Kurt R. Anderson

Employer's Guide to Health Care Reform is designed to assist employers in strategizing and updating their health and welfare benefit plans to comply with the Patient Protection and Affordable Care Act and the Health Care and Education Reconciliation Act of 2010 (which are collectively referred to in this *Guide* as the Affordable Care Act). Along the way, the book identifies opportunities created by the Affordable Care Act for employers to control or reduce their overall health benefit spending. It offers step-by-step guidance to employers struggling to keep up with the rapid pace of changes affecting their health benefit plans. In particular, this edition discusses the major elements of the Affordable Care Act that became effective in 2014—the individual mandate and the establishment of federal and state Exchanges—and describes in detail the employer pay-or-play rules (also called the "employer mandate") that will go into effect in the near future.

Highlights of the 2015 Edition

The Affordable Care Act reflects lawmakers' ambitious goal of transforming the delivery of health care in the United States. Notwithstanding its length, the ACA leaves many of the details of health care reform in the hands of the federal agencies, including the U.S. Departments of Health and Human Services (HHS), Labor (DOL), and Treasury (IRS). Since the enactment of the Affordable Care Act on March 23, 2010, federal regulators have been churning out reams of regulations, procedures, and sub-regulatory guidance to implement the new law. In this edition, you will find discussion of the latest health care reform developments and detailed explanations of these important topics:

- Implementation of the individual mandate, which was declared constitutional in the U.S. Supreme Court's landmark decision *National Federation of Independent Business v. Sebelius*, including the transitional relief and enforcement delays affecting certain individuals (see **Section 2.01**)
- The new requirement for employers with self-funded health plans and insurers to report information to the IRS regarding minimum essential coverage (see **Sections 2.02** and **3.05**)
- The transitional relief and enforcement delays for the employer pay-or-play requirements, which provide flexibility for certain large employers in 2014 and 2015 (see **Sections 3.02** and **3.04**)
- New rules providing flexibility to employers subject to the employer mandate for certain classes of employees, including volunteers, working students, and adjunct faculty (see **Section 3.03**)
- A new chapter to help employers make strategic decisions about the design of their health plans in light of the employer mandate, the advent of "private" exchanges, and the availability of certain other techniques for delivering health benefits to employees (see **Chapter 5**)
- New guidance on how employers may integrate health reimbursement arrangements (HRAs) with other health coverage to satisfy the requirement to provide "minimum essential coverage" (see **Section 6.01**)
- Recent guidance regarding what constitutes preventive care, and how plans can satisfy the requirement to provide preventive care without cost-sharing (see **Section 6.03**)

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- Expanded rules to encourage employers to provide wellness programs to employees (see **Section 6.09**)
- Additional guidance from HHS on what constitutes an "excepted benefit" that would be exempt from many of the ACA requirements (see **Section 7.04**)
- Step-by-step guidance on employers' compliance with the new reporting requirements arising out of the ACA (see **Sections 2.02** and **3.05** and **Chapter 8**)
- An update on medical loss ratio (MLR) rules and experience (see **Section 8.05**)
- The new electronic transaction standards added by the ACA to the list of standards established by HIPAA, including the requirement for certain health plans to obtain a health plan identifier (HPID) in 2014 (see **Section 9.03**)
- An update to the Medicare Part D thresholds, as modified by the ACA (see **Section 9.06**)
- Detailed guidance on the "Cadillac" tax scheduled to become effective in 2018, including suggestions for employers that are already starting to plan for the imposition of the new tax (see **Section 10.01**)
- An update on the amount and reporting of the transitional reinsurance fee payable by insurers and employer-sponsored group health plans in 2015 (see **Section 10.04**)
- Religion-based challenges to certain provisions of the ACA, such as those relating to contraceptive coverage (see **Section 12.04**)
- Challenges to the authority of federally facilitated Exchanges to provide premium tax credits (see **Section 12.05**)

In addition, the 2015 Edition provides examples, charts, and appendices containing important guidance, a list of useful acronyms, and an updated Index.

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ABOUT THE AUTHORS

Brian M. Pinheiro is the chair of the Employee Benefits and Executive Compensation Group at Ballard Spahr LLP and a member of the Health Care Group and the Health Care Reform Initiative. Mr. Pinheiro represents clients on matters relating to employer-sponsored health and welfare benefit plans; executive compensation, including Section 409A and the Section 280G golden parachute rules; and tax-qualified retirement plans, including cash balance pension plans and section 401(k) plans and section 403(b) tax-sheltered annuity programs. Prior to joining Ballard, he was a tax law specialist for the Employee Plans Division of the Internal Revenue Service (National Office).

Mr. Pinheiro is a frequent lecturer on employee benefits and executive compensation issues and an adjunct professor of law at Temple University James F. Beasley School of Law. *Chambers USA: America's Leading Lawyers for Business* named Mr. Pinheiro a leader in the field of benefits and compensation law in the 2006 through 2014 editions. He also is co-editor of *ERISA: A Comprehensive Guide, Fourth Edition* and co-author of *Employee Stock Ownership Plan Answer Book, Fourth Edition* (both published by Wolters Kluwer).

Mr. Pinheiro graduated with distinction from Georgetown University Law Center with an LL.M. in tax law and a Certificate in Employee Benefits. He is a graduate of Boston College (B.A.), and Catholic University of America Columbus School of Law (J.D., *magna cum laude*), where he served as Production Editor for the Catholic University Law Review.

Jean C. Hemphill is a partner in the Business and Finance Department of Ballard Spahr LLP. She is the chair of the Health Care Group and a member of the Employee Benefits and Executive Compensation, Mergers and Acquisitions/Private Equity, Nonprofit Organizations, and Higher Education Groups. She concentrates her practice in the areas of general corporate, health care, employee benefits, and nonprofit, health care, and church plan laws.

Before joining Ballard Spahr in 1997, Ms. Hemphill was Vice President and General Counsel of the Board of Pensions of the Presbyterian Church (U.S.A.). She continues to serve as General Counsel for the Board and legal counsel to numerous other denominational benefits programs. She is a director of the National Health Law Project and a frequent lecturer on health care and nonprofit law subjects.

Ms. Hemphill is a graduate of the University of Pennsylvania and Temple University's James E. Beasley School of Law. She has an AV Peer Review Rating from Martindale-Hubbell.

Jonathan M. Calpas is an associate in the Employee Benefits and Executive Compensation Group at Ballard Spahr LLP. Mr. Calpas represents for-profit, tax-exempt, church, and government employers on matters related to tax-qualified retirement plans and employer-sponsored health and welfare plans. He focuses on compliance with the statutory and regulatory rules relating to such plans, including rules arising out of the Internal Revenue Code, ERISA, and HIPAA.

Before joining Ballard Spahr, Mr. Calpas worked for a large cable communications company as a financial accountant, and also worked for a major public accounting firm assisting clients with corporate and partnership tax compliance issues. Mr. Calpas is a Certified Public Accountant in the Commonwealth of Pennsylvania.

Mr. Calpas is a graduate of Pennsylvania State University (B.S., *with distinction*) and Temple University James E. Beasley School of Law (J.D.), where he was a member of the *Temple Journal of Science, Technology & Environmental Law*.

Kurt R. Anderson is counsel in the Employee Benefits and Executive Compensation Group at Ballard Spahr LLP. Mr. Anderson's practice encompasses a full range of services with respect to the creation, administration, and termination of employee benefit plans, including both retirement and health and welfare plans. He has substantial experience in advising public- and private-sector clients regarding operational compliance and communication of employee benefit plans.

Mr. Anderson is a graduate of Yale College (B.A., *cum laude*) and the University of Pennsylvania Law School (J.D., *cum laude*).

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We also wish to thank our families and friends who have tolerated interminable discussions about health care reform over the past several years.

PREFACE

"What does health care reform really mean?" This is the question we have heard over and over again since the summer of 2009 from clients, friends, neighbors, and family members, and even from total strangers calling and e-mailing in to television and radio shows. Media reports focused on some of the more scandalous rumors, including the now infamous "death panel" debate among national politicians. Somehow, new legislation that meant so much for so many seemed to be understood by so few.

Beginning in the summer of 2009 and continuing through the first half of 2014, we undertook to educate ourselves and to explain to our clients (many of whom are employers) exactly how and why health care reform is relevant. Along the way, we discovered that health care reform is having a significant impact on virtually every employer, and presents some cost-savings opportunities upon which employers who are paying attention can capitalize. Debate over health care reform rages on in Congress (in the form of amending legislation), in the courts and among the states, which are playing a significant role in the implementation of the Affordable Care Act.

In 2013, the focus shifted to the U.S. Department of Health and Human Services (HHS) and the states, which were working feverishly to design and implement Affordable Health Care Exchanges, one of the centerpieces of health care reform, that opened in January 2014. Employers, after being granted a one-year reprieve (until 2015) from the employer pay-or-play rules, need to analyze whether their group health plans will avoid the pay-or-play penalties. While the landmark 2010 legislation created a blueprint for health care reform in the United States, we are certain that the specifics will continue to evolve in 2015 and future years.

We wrote this book to serve as a guide to health care reform for employers. We tried to be comprehensive while still providing practical pointers. We hope you find this book to be as helpful as we have found the process of writing it to be interesting.

Brian Pinheiro
Jean Hemphill
Jonathan Calpas
Kurt Anderson

LIST OF ACRONYMS

ACA	Affordable Care Act
ACIP	Advisory Committee on Immunization Practices
ACO	Accountable care organizations
AD&D	Accidental death & dismemberment insurance
AHRQ	HHS Agency for Healthcare Research and Quality
AMT	Alternative minimum tax
AWP Statutes	Any willing provider statutes
CABG	Coronary artery bypass graft surgery
CBO	Congressional Budget Office
CDC	Centers for Disease Control
CHIP	Children's Health Insurance Program
CLAS	Culturally and linguistically appropriate services
CMS	HHS Centers of Medicare and Medicaid Services
COBRA	Consolidated Omnibus Budget Reconciliation Act of 1985
CPI-U	Consumer Price Index for All Urban Customers
DOL	U.S. Department of Labor
DRG	Diagnostic related group
EGWP	Employer group waiver plan
EMTALA	Emergency Medical Treatment and Labor Act
EPSDT	Early and Periodic Screening, Diagnostic and Treatment
ERISA	Employee Retirement Income Security Act of 1974
ERL	Early retiree list (for ERRP)
ERRP	Early Retiree Reinsurance Program
FEHBP	Federal Health Benefits Program
FDA	Food and Drug Administration
FICA	Federal Insurance Contributions Act
FLSA	Fair Labor Standards Act of 1938
FMLA	Family and Medical Leave Act of 1993
FPL	Federal poverty level
FSA	Flexible spending account
FTE	Full-time equivalent employee
FUTA	Federal Unemployment Tax Act
GDP	Gross domestic product
HCERA	Health Care and Education Reconciliation Act of 2010
HDHP	High-deductible health plan
HELP	U.S. Senate Health, Education, Labor and Pension Committee
HHS	U.S. Department of Health and Human Services
HI	Hospital Insurance (portion of FICA)
HIPAA	Health Insurance Portability and Accountability Act of 1996

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CHAPTER 1
INTRODUCTION

It has been five years since the enactment of the Patient Protection and Affordable Care Act (PPACA), commonly known as the Affordable Care Act (ACA), and employers are still wondering how to comply with the Act, how to structure their employee health benefit plans to provide cost-effective benefits, and how to take advantage of any opportunities created by the Act. *Employer's Guide to Health Care Reform* addresses each of these questions for employers.

The health care reform effort launched in 2010 is a once-in-a-generation overhaul of about one-sixth of the United States economy.[1] In a landmark decision, the U.S. Supreme Court determined that the ACA is constitutional and, barring repeal, is here to stay.[2] Health care reform could fundamentally alter the manner in which health care benefits are provided to Americans, potentially shifting from an employment-based system to an individual-based system run through "Exchange" marketplaces organized at the state level. Shortly after signing the PPACA on March 23, 2010, President Obama said:

> I said this once or twice, but it bears repeating: If you like your current insurance, you will keep your current insurance. No government takeover; nobody is changing what you've got if you're happy with it. If you like your doctor, you will be able to keep your doctor. In fact, more people will keep their doctors because your coverage will be more secure and more stable than it was before I signed this legislation.[3]

While the Affordable Care Act does not force individuals to drop or change their coverage, it remains to be seen whether employers, through which many individuals currently have health insurance coverage, decide to continue to provide the same type of coverage in light of the health care reform changes. Because health care reform has been (and will continue to be) implemented piecemeal over the next several years, subject to intervening federal and state election cycles, it is difficult to predict what the health care system will look like in the future. Legislative changes, regulatory interpretations, court decisions, and marketplace reactions all will shape the manner in which health care reform is implemented.

In 2014, two of the three major provisions of the ACA have taken effect—the "individual mandate," which requires individuals to enroll in health coverage or pay a penalty, and the institution of federal or state Exchanges (also called Marketplaces), where individuals and some small employers can purchase their own health insurance coverage. A third major provision, the employer pay-or-play requirements (also called the "employer mandate"), has been delayed until at least 2015. In court, one federal appellate court has declared that Exchange subsidies may not be offered in the majority of states

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[1] *See* PPACA § 1501(a)(2)(B) (finding that "[n]ational health spending is projected to increase from [$2.5 trillion], or 17.6 percent of the economy, in 2009 to [$4.7 trillion] in 2019"). *See also* Executive Office of the President, Council of Economic Advisors, *The Economic Case for Health Care Reform*, http://www.whitehouse.gov/assets/documents/CEA_Health_Care_Report.pdf, at 1 (June 2009) (providing that health care expenditures represent almost 18 percent of GDP in 2009 and are projected to rise to 34 percent of GDP by 2040); Congressional Budget Office, *The Long Term Outlook for Health Care Spending*, http://www.cbo.gov/ftpdocs/87xx/doc8758/MainText.3.1.shtml, at 3 (indicating the total spending on health care for 2007 equaled about 16 percent of the United States GDP for that year).

[2] National Fed'n of Indep. Bus. v. Sebelius, 567 U.S. _____, 132 S. Ct. 1133 (2012).

[3] President Obama, remarks at the U.S. Department of the Interior (Mar. 23, 2010), http://www.whitehouse.gov/the-press-office/remarks-president-and-vice-president-health-insurance-reform-bill-department-interior.

that have opted to have the federal government establish their Exchanges, calling into question whether the individual mandate and the employer mandate will continue to stand.

The breadth and depth of the changes to the U.S. health system set forth in ACA, the tens of thousands of pages of regulations and other official guidance implementing various provisions of the Act, and the protracted and divisive political process that led up to and has followed enactment, all have contributed to the substantial confusion among employers that have to comply with the Act. The 2015 Edition of *Employer's Guide to Health Care Reform* discusses the following important issues for employers:

- **Chapter 2** explains the individual mandate, which is sometimes referred to as "individual enroll-or-pay." Beginning in 2014, all individuals must enroll in health coverage or pay a penalty, unless an exemption applies. The U.S. Supreme Court, in *National Federation of Independent Business v. Sebelius*, determined that the individual mandate was constitutional.
- **Chapter 3** describes the corollary to the individual mandate for employers—the "employer pay-or-play." Beginning in 2015, employers with 100 or more full-time equivalent employees must offer health coverage to their full-time employees or pay a penalty. Beginning in 2016, employers with 50 or more full-time equivalent employees must offer health coverage to their full-time employees or pay a penalty. The employer pay-or-play rules are complex, and it is easy for employers to make an inadvertent error that results in a substantial penalty.
- **Chapter 4** discusses the health care "Exchanges" or "Marketplaces" that opened for business in 2014. In each state, a federally run or state-run Exchange allows individuals and some small businesses to purchase health insurance from a variety of private health insurers. In addition, the Exchanges offer a series of income-based subsidies to assist lower-income individuals in purchasing affordable health insurance.
- **Chapter 5** explains in detail the types of strategic decisions that employers need to face as a result of the Affordable Care Act. While full compliance with the ACA will avoid penalties under the "pay" portion of employer pay-or-play, that may not be the most cost-efficient outcome for every large employer. Some employers might have workforces that are better suited to get subsidized coverage through an Exchange, and that approach may make better economic sense for the employer and its employees.
- **Chapter 6** discusses the basic changes to health plan design that have become effective under the ACA since 2010. These are the nuts and bolts of health care reform for employers—from the elimination of preexisting-condition exclusions, to the requirement to cover preventive health services without cost-sharing, to the required changes to the claims and appeals process. Employers will need to amend their plan documents and communications materials to reflect the changes.
- **Chapter 7** describes in detail certain exemptions from the ACA requirements. Grandfathered health plans will allow an employer to avoid some, but not all, of the health care reform changes. Plans that cover only retirees or those that provide certain "excepted" benefits, on the other hand, can be exempt from most of the ACA's market reform requirements. Employers will need to carefully consider whether they can or should take advantage of these exemptions.
- **Chapter 8** addresses the reporting, transparency, and accountability requirements that the ACA imposes on employers, group health plans, and health insurance issuers. This chapter also describes the types of information that will become available to individuals about their health coverage options either directly from their employer (or health plan sponsor) or through a United States Department of Health and Human Services Web site.

- **Chapter 9** explains some additional operational changes in the ACA that will have a direct or indirect effect on employers, including new nondiscrimination requirements applicable to insured group health plans and new electronic transaction standard requirements.
- **Chapter 10** examines the new taxes and other revenue raisers included in the ACA that will impact employers directly or indirectly. Chief among the new taxes is the "Cadillac" tax, which is a 40 percent excise tax on health coverage that is determined to be too valuable to employees and their dependents. Although the Cadillac tax is not scheduled to become effective until 2018, employers that could be subject to it (and, particularly, unionized employers) should start to consider strategies for avoiding the Cadillac tax down the road.
- **Chapter 11** addresses the significant temporary (now historical) programs that were established to preserve, extend, or expand coverage to the demographic groups most likely to be uninsured: high-risk individuals, early retirees, and young adults. These programs generally expired by the beginning of 2014.
- **Chapter 12** discusses various legal challenges to the constitutionality of the Affordable Care Act, including the U.S. Supreme Court's landmark 2012 decision in *National Federation of Independent Business v. Sebelius*, as well as the more recent 2014 cases addressing whether certain companies could avoid the requirement to provide preventative contraceptive coverage without cost-sharing on religious grounds (*Hobby Lobby Stores, Inc. v. Sebelius*)[4] and whether subsidies can be offered in federally established Exchanges (*Halbig v. Burwell* and *King v. Burwell*).[5]

The 11 appendices in *Employer's Guide to Health Care Reform* provide handy references to primary source guidance issued by the regulatory agencies, relevant forms and instructions, and model notices.

[4] Hobby Lobby Stores, Inc. v. Sebelius, 133 S. Ct. 641 (2012).
[5] Halbig v. Burwell, No. 14-5018 (D.C. Cir. July 22, 2014); King v. Burwell, No. 14-1158 (4th Cir. July 22, 2014).

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