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*Presented by:*  
**Kathleen Reilly Barrow (Rapid City)**

**February 11, 2014**

**The Affordable Care Act: Current Developments**

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- Represents management exclusively in every aspect of employment, benefits, labor, and immigration law and related litigation
- Over 700 attorneys in 49 locations nationwide
- Current caseload of over 5,000 litigations and approximately 300 class actions
- Founding member of L&E Global



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# Your Presenter Today

## ● Kathleen Barrow, Shareholder(Rapid City)

- Over 20-years experience in ERISA employee benefit, executive compensation and employment-related tax matters
- Practice focuses on employer and plan defense of IRS and DOL audits of plans, payroll and compensation systems
- Over 10-years experience litigating employee plan and compensation-related tax issues before the United States Tax Court, US District Courts and Courts of Appeal
- Has trained over 5000 employers nationwide on issues arising under the Affordable Care Act

# Congressional Budget Office

## February 4, 2014 Report

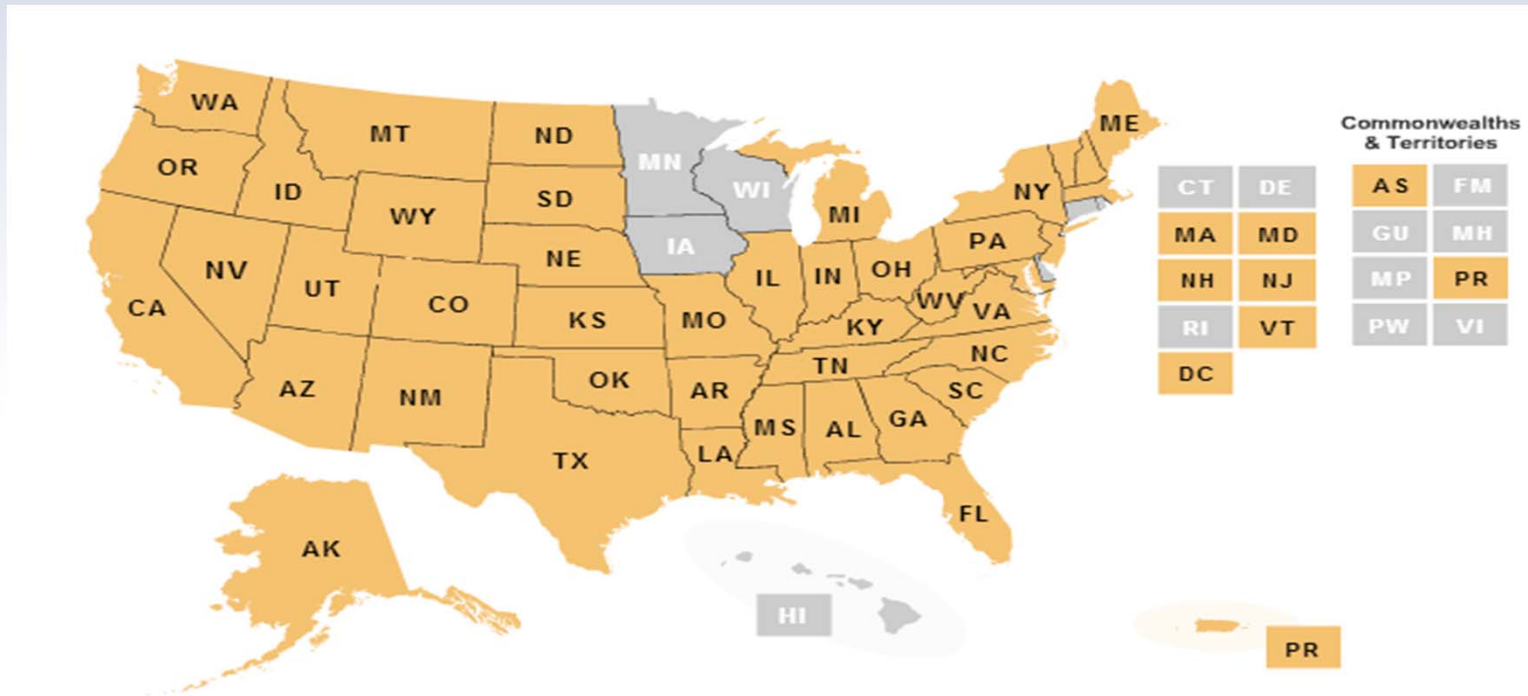
### ● Financial Effects of ACA on Health Insurance Coverage

- Gross cost of insurance provisions goes from \$40 billion to \$208 billion from 2014 to 2024—but is offset by premium reserves that grow from \$2 billion to \$137 billion during this time period
- Number of employer-sponsored health insurance plans decreases 2 million in 2015 and 7 million per year year by 2025—correspondingly, individually purchased insurance grows from 6 million to 24 million per year in the same time period
- Number of uninsured individuals decreases 13 million in 2014 and 25 million by 2024—but 31 million remain uninsured
- ACA will add to deficit \$9 billion by 2024
- Cost of ACA implementation \$10 billion as to IRS; \$10 billion to other federal agencies.

# Effect of ACA on Labor Market

- Three factors contribute to decrease in labor participation
  - Extension of unemployment compensation and “stigma” associated with the long-unemployed
  - Aging workforce—percentage of potential labor force who are retirement age increases
  - The tax credits and subsidies under the ACA, along with increased taxes associated with higher income brackets, provide disincentive for workers to work harder and earn more (2.3 million full-time jobs deleted?)
  - However, in the short-term, 2014-2016, employers will add more workers to labor force as a result of the ACA –arguments exist as to whether the jobs will be full-time or part-time

# \$150 Million in Grants for 236 New Community Health Centers





# Functions of Community Health Centers

- \$50 million allocated to mental health and addiction/substance abuse-related treatment services
- \$130 million to train teachers to recognize mental health problems in students
- 5,000 mental health professionals trained to staff centers
- Healthcare Exchange enrollment and support services

# Clarification on ACA Implementation

- For non-grandfathered plans, first policy year after September 14, 2014—plans (individual and group) must offer women who are high risk for breast cancer, certain medications to lower breast cancer risk at 100% paid benefit
- For non-grandfathered plans, overall cost-sharing limitations for plan years commencing 2014 for out-of-pocket costs is \$6,350 for individual coverage and \$12,700 for non-individual coverage—adjusted in future years for non-grandfathered plans. With respect to plans with more than one administrator for various benefits, for the first plan year commencing on or after 2014, the out-of-pocket maximum limitation will enjoy a “safe harbor” if
  - The plan’s major medical coverage complies with the safe harbor limitations; AND
  - Out of pocket maximums for other coverage does not exceed the dollar amounts for out-of-pocket maximums for 2014.
  - For plan years ON OR AFTER 1/1 2015, all non-grandfathered plans must have an out-of-pocket maximum that limits over-all out-of-pocket costs on ALL essential health benefits, regardless whether plan utilizes more than one plan administrator
  - Out-of-pocket annual maximum limitations DO NOT apply to health benefits that are “non-essential,” “out-of-network” or not covered by the plan.

# Clarification on ACA implementation

- Commencing with plan years on and after January 1, 2015
  - Cost-sharing limitations apply (with no safe-harbor as to separately administered benefits) to non-grandfathered plans
  - Plans may allocate fractions of the out-of-pocket limitations amount to categories of essential benefits, so long as the aggregate of the fractional allocations applicable to all essential benefits do not exceed the annual limit on out-of-pocket maximums
- Annual deduction limitations apply only to small group plans.
  - For 2014, deductible limitations may not exceed \$2,000 for individual coverage and \$4,000 for any other type of coverage
  - For 2014, deductible limitations will be \$2,150 (individual) and \$4,300 (other coverage)

# Clarification on ACA Implementation...cont.

- With respect to expatriates who reside outside US for 6 months of 12-month period, their group health plan (i.e., may be a plan required by a foreign government as to residents of the country) will be deemed in compliance with the ACA [these rules will be effective as to all plan years ending before December 31, 2016]
- For wellness programs
  - Discounts (or surcharges) for compliant wellness program is a maximum of 30 percent of premium (i.e., for weight/diabetes/hypertension programs) and 50% for tobacco prevention or reduction programs
  - Offer of a mid-year (second chance) enrollment into a wellness program is permitted. Plan may (discretionary) offer awards or pro-rate awards for mid-year participants.
  - Plans must provide rewards for appropriate medically-appropriate alternatives to wellness program protocol

# ACA Clarification Implementation...cont.

- Requirements for indemnity plan to qualify as excepted benefit
  - Sold only to individuals that have minimum essential coverage
  - No coordination of benefits between two plans
  - Benefits fixed dollar amount, regardless of expenses incurred
  - Notice provided that plan does not provide minimum essential coverage
- ACA and Mental Health Parity (effective for plan years commencing after July 1, 2014)
  - Non-grandfathered, individual plans must provide mental health and substance abuse benefits and must comply with federal parity rules
  - Grandfathered individual market plans are not required to provide mental health and substance abuse coverage—but must comply with federal parity rules if they chose to provide such coverage
  - Non-grandfathered small group coverage plans must provide mental health and substance abuse coverage and must comply with federal parity rules

# What's In the Tax News?

- **New Guidance (1/16/2014) on additional Medicare tax withholding and reporting**
  - Employers must withhold additional .9% Medicare tax from any employee's wages who receives wages in excess of \$200,000 [additional Medicare tax is .9% on \$200,000 for individual filers; \$250,000 on taxpayers who are married filing jointly and \$125,000 for married taxpayers filing separately]
  - Employers must disregard spousal income—An employee earning, for example, \$180,000 with a spouse that earns \$100,000 will owe additional Medicare tax when the employee files his/her joint tax return
  - Additional withholding applies only to employee portion—not employer's portion of Medicare tax
  - Excess Medicare tax paid will be refunded via tax return
  - A taxpayer must file Form 8959 with federal tax return if (i) employee owes additional Medicare tax; or (ii) employee's employer withheld and paid additional Medicare tax

**Additional Medicare Tax**

▶ If any line does not apply to you, leave it blank. See separate instructions.  
▶ Attach to Form 1040, 1040NR, 1040-PR, or 1040-SS.  
▶ Information about Form 8959 and its instructions is at [www.irs.gov/form8959](http://www.irs.gov/form8959).

Name(s) shown on Form 1040

Your social security number

<b>Part I Additional Medicare Tax on Medicare Wages</b>			
<b>1</b>	Medicare wages and tips from Form W-2, box 5. If you have more than one Form W-2, enter the total of the amounts from box 5	<b>1</b>	
<b>2</b>	Unreported tips from Form 4137, line 6	<b>2</b>	
<b>3</b>	Wages from Form 991B, line 5	<b>3</b>	
<b>4</b>	Add lines 1 through 3	<b>4</b>	
<b>5</b>	Enter the following amount for your filing status: Married filing jointly . . . . . \$250,000 Married filing separately . . . . . \$125,000 Single, Head of household, or Qualifying widow(er) \$200,000	<b>5</b>	
<b>6</b>	Subtract line 5 from line 4. If the result is zero or less, enter 0	<b>6</b>	
<b>7</b>	Additional Medicare Tax on Medicare wages. Multiply line 6 by 0.9% (.009). Enter here and go to Part III	<b>7</b>	
<b>Part II Additional Medicare Tax on Self-Employment Income</b>			
<b>8</b>	Self-employment income from Schedule SE (Form 1040), Section A, line 4, or Section B, line 6. If you had a loss, enter 0 (Form 1040-PH and Form 1040-SS filers, see instructions.)	<b>8</b>	
<b>9</b>	Enter the following amount for your filing status: Married filing jointly . . . . . \$250,000 Married filing separately . . . . . \$125,000 Single, Head of household, or Qualifying widow(er) \$200,000	<b>9</b>	
<b>10</b>	Enter the amount from line 9	<b>10</b>	
<b>11</b>	Subtract line 10 from line 8. If zero or less, enter 0	<b>11</b>	
<b>12</b>	Subtract line 11 from line 8. If the result is zero or less, enter 0	<b>12</b>	
<b>13</b>	Additional Medicare Tax on self-employment income. Multiply line 12 by 0.9% (.009). Enter here and go to Part III	<b>13</b>	
<b>Part III Additional Medicare Tax on Railroad Retirement Tax Act (RRTA) Compensation</b>			
<b>14</b>	Railroad retirement (RRTA) compensation and tips from Form(s) W-2, box 14 (see instructions)	<b>14</b>	
<b>15</b>	Enter the following amount for your filing status: Married filing jointly . . . . . \$250,000 Married filing separately . . . . . \$125,000 Single, Head of household, or Qualifying widow(er) \$200,000	<b>15</b>	
<b>16</b>	Subtract line 15 from line 14. If zero or less, enter 0	<b>16</b>	
<b>17</b>	Additional Medicare Tax on railroad retirement (RRTA) compensation. Multiply line 16 by 0.9% (.009). Enter here and go to Part IV	<b>17</b>	
<b>18</b>	Add lines 7, 13, and 17. Also include this amount on Form 1040, line 60, (Form 1040-NR, 1040-PH, and 1040-SS filers, see instructions) and go to Part V	<b>18</b>	
<b>Part V Withholding Reconciliation</b>			
<b>19</b>	Medicare tax withheld from Form W-2, box 5. If you have more than one Form W-2, enter the total of the amounts from box 5	<b>19</b>	
<b>20</b>	Enter the amount from line 19	<b>20</b>	
<b>21</b>	Multiply line 20 by 1.45% (.0145). This is your regular Medicare tax withholding on Medicare wages	<b>21</b>	
<b>22</b>	Subtract line 21 from line 19. This is your Additional Medicare Tax withholding on Medicare wages	<b>22</b>	
<b>23</b>	Additional Medicare Tax withholding on railroad retirement (RRTA) compensation from Form W-2, box 14 (see instructions)	<b>23</b>	
<b>24</b>	<b>Total Additional Medicare Tax withholding.</b> Add lines 22 and 23. Also include this amount with federal income tax withholding on Form 1040, line 62 (Form 1040-NR, 1040-PH, and 1040-SS filers, see instructions)	<b>24</b>	

# Obligation to Make Estimated Payments

- Employees who know their income with spouse may reach \$250,000 should consider asking employer to increase Medicare tax withholding (Form W-4)
- Penalties exist for failing to pay increased estimated Medicare tax on a quarterly basis (additional Medicare tax is subject to quarterly estimated tax deposit requirements).
- IRS Form 2210 must be filed with tax return (commencing 2013 return) if there are underpayments. The penalty is 3% of the underpayment amount for the number of days in each quarter the underpayment exists



# Drilling Down on the New Cause of Action for Employees Under ACA

- Section 18c of the FLSA (29 U.S.C. § 218c)—no employer may discharge an employee or discriminate against the employee in the conditions, terms or privileges of employment because
  - Employee went to Exchange and received tax credit or subsidy
  - Made a complaint regarding a violation of the ACA
  - Testified in a proceeding regarding ACA
  - Assisted in an investigation regarding or under the ACA
  - Objected to an employment policy or practice the employee believed violated the ACA

# Complaints under the ACA

- Follows procedures identified under 15 U.S.C. § 2087(b) (Whistleblower/Consumer Protection statutes)
  - 180 days to file a complaint with DOL
  - 60 days for employer to file a response
  - Mandatory investigation and administrative determination of “reasonable cause”
  - Party who disagrees must file objection within 30 days of reasonable cause determination—failure to object waives right to judicial review
  - Administrative hearing on objection follows
    - Relief may be granted employee if it is determined that ACA behavior was “contributing factor” in employer action
    - Employer must show ACA behavior not a contributing factor by “clear and convincing evidence”

# FLSA Section 218c Complaint Procedure cont....

- DOL issues final order on administrative proceeding within 120 days following hearing
  - Award an injunctive order for affirmative action
  - Reinstatement and back-pay
  - Compensatory damages, including attorneys fees
- If no DOL determination by 210 days—or following 90 days after written determination is issued, aggrieved employee may file civil action in court where both compensatory and special damages may be awarded
- If DOL finds employee filed action in “bad faith” the employer may be awarded attorneys’ fees up to \$1000
- If no civil action is filed, DOL final determination is appealable directly to Court of Appeals upon filing of petition within 60 days

# Section 218c Regulations

- The term “employee” includes applicants for employment and employees of US and State government, agencies and political subdivisions
- Employer definition includes insurance companies or other person acting on behalf of employer
- Employee complaints may be made in writing or orally—and are administered by OSHA
- If no objection is filed within 30 day of preliminary finding by OSHA, the finding is deemed “final”
- Back-pay awards accrue interest at the rate applicable to unpaid unemployment taxes under Code § 6621, compounded **daily**.

# Health Care Developments

## Pay or Play

- Shared Responsibility/Pay or Play
  - IRS has stated that final regulations would be issued by year end—we anticipate the regulations within the first quarter of 2014
  - Final regulations are expected to address transition guidance
    - Including whether fiscal year plans will need to comply by 1/1/15 or the first day of their plan year that begins in 2015; including the conditions that must be met to qualify for any transitional relief
    - Whether there will be a transitional measurement period as was provided in the proposed regulations (6 month measurement period/12 month stability period)
    - Dependent coverage transition rules
    - And, perhaps, to increasing hours for “full-time” definition to 40 per week

# Guidance Also Promised ...

- Also anticipate guidance coming on auto-enrollment and annual reporting by insurance company; self-funded plans; and employers; and
- Regulations under section 2716 of PHSA, which imposes non-discrimination rules on fully insured plans
  - IRS Notice 2011-1 suspends enforcement until Treasury Regulations are issued
  - Once Regulations are issued, employers who offend must file Form 8928 and self-report their discriminatory plans and report excise taxes due to IRS
  - Penalty is \$100/day/participant discriminated against

# Legislative Updates

## Bills before the House and Senate:

H.R. 3622 to repeal the ACA; H.R. 3474 to exempt certain individuals of TRICARE or VA health plans from minimum essential coverage;

H.R. 3358 to exempt individuals who live in states where exchange website is not functional;

H.R. 2789, to delay enrollment in qualified health plans until Exchange security and verification implementation is complete;

S. 1671, to delay individual mandate;

S. 1693, to extend initial open enrollment period;

S. 1330, to delay employer responsibility provisions of ACA;

S. 701, to modify definition of “full-time employee” under the ACA;

# Court Updates

- Corporate challenges to ACA preventative care mandate as to contraceptives and abortatives (morning-after pills)
  - *Eden Foods v. Sebelius*,-- injunction denied and petition for cert to Supreme Court pending
  - *Hobby Lobby Stores, Inc. v. Sebelius*,-- injunction granted by W.D. Okla. court upon direction of 10<sup>th</sup> Cir. and Sebelius has filed petition for cert to Supreme Court
  - Case issues and determinations--
    - Anti-injunction act does not apply to individual mandate penalties
    - Corporations have standing to vindicate rights under Free Exercise Clause of the 1<sup>st</sup> Amendment
    - Whether preventative services mandates unconstitutionally infringes upon Free Exercise of Religion under 1<sup>st</sup> Amendment



# Court Updates

- *Little Sisters of the Poor Home for the Aged v. Sebelius*, -  
-Catholic religious organizations (non-profit) challenge  
ACA preventative services mandate
  - US Supreme Court has issued temporary (Dec 31, 2013) and permanent injunction (January 24, 2014) against the mandate as to contraceptive and abortives pending appeal of injunction denial that is being heard by the 10<sup>th</sup> Cir.
  - Courts have agreed the Catholic service organization has standing to contest the preventative services mandate
  - Question pending is whether the preventative services mandate violates Free Exercise Clause of 1<sup>st</sup> Amendment
  - Similar cases pending in 6<sup>th</sup>, 8<sup>th</sup>, and DC Circuit Courts and District Courts in TX, OH, PA, IN



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**ANY QUESTIONS?**



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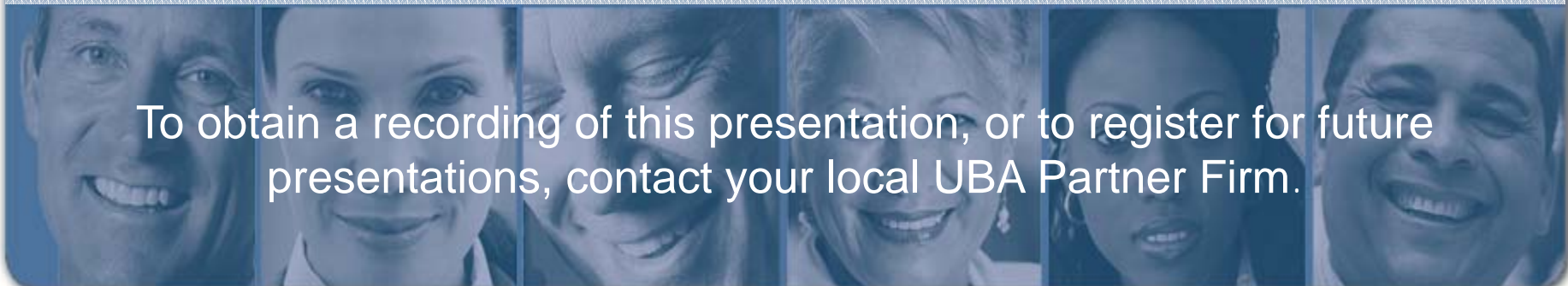
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