

# Benefits Report

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## Determination of Employer “Pay or Play” Assessment Under Affordable Care Act Cast into Doubt Following Recent Court Split

TIFFANY N. SANTOS

As employers prepare to comply with the Affordable Care Act’s employer shared responsibility provision (or “Pay or Play” requirement) under Section 4980H of the Internal Revenue Code (the “Code”), two recent conflicting Court of Appeals decisions regarding the availability of the premium tax credit to purchase Marketplace/Exchange coverage could impact the Section 4980H’s employer assessment provision.<sup>1</sup> Section 4980H permits the Internal Revenue Service (“IRS”) to assess one of two payments on an “applicable large employer” (generally, an employer with more than 50 full-time employees, taking into account hours worked by part-time employees), depending on whether:

- The employer offers its full-time employees the opportunity to enroll in “minimum essential coverage” (for a discussion of these penalties, see our [February 2014 newsletter](#)); AND
- At least one full-time employee purchases individual Marketplace/Exchange coverage with a federal premium tax credit or cost sharing reduction.

For those employers with employees in any of the 37 states (including Oregon) whose Marketplace/Exchange is run by the federal government, any assessment due under Section 4980H may be significantly reduced or eliminated entirely if the D.C. Circuit Court of Appeals ruling stands and residents of such states cease to qualify for the premium tax credit to purchase Marketplace/Exchange coverage.<sup>2</sup>

<sup>1</sup> See the Fourth Circuit Court of Appeals’ decision in *King v. Burwell* (<http://www.ca4.uscourts.gov/opinions/published/141158.p.pdf>) and the District of Columbia Court of Appeals decision in *Halbig v. Burwell* ([http://www.cadc.uscourts.gov/internet/opinions.nsf/d91f8bac85257d1d004e6176/\\$file/14-5018-1503850.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/d91f8bac85257d1d004e6176/$file/14-5018-1503850.pdf)).

<sup>2</sup> Section 1321 of the Affordable Care Act provides that a state may elect to establish a Marketplace/Exchange. If a state opts not to establish its own Marketplace/Exchange or fails to establish one by January 1, 2014, then, under Section 1321(c), the federal government will establish and operate such Marketplace/Exchange within that state.

The IRS’s interpretation that the premium tax credit is available to taxpayers enrolled in coverage in either a state-run or federally-run Marketplaces/Exchanges is found in 26 CFR Section 1.36B-2(a)(1).

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## Trucker + Huss Attorneys Recognized as 2014 Northern California Super Lawyers and Rising Stars

Attorneys **Brad Huss, Lee Tucker, Barbara Creed, Charles Storke, Benjamin Spater, Robert Schwartz, Charles Dyke** and **Clarissa Kang** were all selected as 2014 Northern California Super Lawyers by Super Lawyers Magazine. Only 5% of Northern California attorneys receive this honor. We are also very proud to announce that addition to earning Super Lawyer honors, **Brad Huss** again made the magazine's list of Top 100 Lawyers in Northern California this year. Super Lawyers compiles their list of top Northern California attorneys through a process in which peer nominations and third party research are combined with a final evaluation in which the top lawyers in the region confidentially evaluate their professional peers.

### Split Decisions

On July 22, 2014, both the D.C. Circuit Court of Appeals and the Fourth Circuit Court of Appeals issued decisions in *King v. Burwell* and *Halbig v. Burwell*, respectively, construing the Affordable Care Act's premium tax credit provision under Section 36B of the Code and related 2012 Treasury Department regulations, wherein the IRS interpreted the statute to grant the credit to individuals who purchase health insurance on either the state-run insurance Marketplaces/Exchanges or the federally-facilitated Marketplace/Exchange. Section 36B defines the annual premium tax credit available to a taxpayer by reference to the coverage months in which the taxpayer is enrolled in a health plan "through an Exchange established by the State".

#### *King v. Burwell*

Ruling that the aforementioned language was ambiguous and subject to multiple interpretations, the Fourth Circuit Court of Appeals applied deference to the IRS's interpretation and found that Section 36B permitted the IRS to grant the credit to taxpayers enrolled in both state *and* federally-facilitated Marketplace/Exchanges. The Fourth Circuit further reasoned that the IRS's interpretation of Section 36B was consistent with the ACA's goal of expanding access to health insurance coverage, and subsidizing the purchase of insurance through federal exchanges helped further that goal.

#### *Halbig v. Burwell*

In *Halbig*, a three-judge panel for the D.C. Circuit Court of Appeals ruled that the language above "unambiguously restricts the Section 36B subsidy to insurance purchased on Exchanges 'established by the State'" and vacated the IRS's interpretation, but withheld its effect until the decision could be appealed. In contrast to the Fourth Circuit, the panel concluded there was no evidence of Congressional intent to establish subsidies to purchase health insurance coverage on both federal and state Marketplaces/Exchanges.

### What Should Employers Do?

While we understand that one or both decisions are likely to be appealed and may even be reviewed by the United States Supreme Court if upheld, Section 4980H remains in full effect. Thus, to the extent that it provides an incentive for employers to offer coverage to minimize any potential assessment, any decision to discontinue coverage would probably be premature until the cases are resolved. Employers should continue their efforts to comply with Section 4980H while monitoring the status of these cases. If you have any questions, please contact the author of this article.



## Time to Restate 401(k) Prototype and Volume Submitter Plans

JENNIFER D. BROOKS

If your 401(k), or other defined contribution plan document is a prototype or volume submitter plan, then it may seem like just yesterday you were contacted

by your document provider and asked to restate your plan document for Economic Growth and Tax Relief Reconciliation Act of 2001 ("EGTRRA"). In fact, six years have passed since the EGTRRA restatement window opened, and it is now time for the latest restatement window, what is being referred to this time around as the Pension Protection Act of 2006 ("PPA") restatement window. In [Announcement 2014-16](#), the IRS announced the opening of the PPA restatement window for defined contribution, including 401(k), prototype and volume submitter plan documents. The PPA restatement documents must be adopted by April 30, 2016. Failure to complete the restatement by the April 30, 2016 deadline will jeopardize a plan's tax-qualified status. The IRS also announced that it will begin to accept individual determination letter applications for the PPA restatement documents from May 1, 2014, through April 30, 2016.

### Pre-approved Plan 6-year Cycle

The IRS revamped the restatement timing and related remedial amendment system back in 2005. At that time, the IRS established a 6-year cycle for pre-approved plan documents such as prototype and volume submitter documents. The initial 6-year cycle ended on April 30, 2010, the deadline for plan sponsors using a prototype or volume submitter document to adopt an EGTRRA restatement. The second 6-year cycle is now in full swing. It began with the provider's submission of prototype and volume submitter documents to the IRS for new opinion or advisory letters between February 1, 2011 and April 2, 2012. In [Announcement 2014-16](#), the IRS notified practitioners and sponsors that those opinion and advisory letters would be issued on March 31, 2014, or soon thereafter. As a result, plan sponsors utilizing pre-approved plan documents can begin to adopt the PPA restatements,

and beginning on May 1, 2014, those plan sponsors can submit individual determination letter applications for such documents if they choose to do so.

### Determination Letter Applications for Pre-Approved Plans

In recent years, the IRS limited the categories of pre-approved plan documents that can be submitted for an individual determination letter on Form 5307. If your plan uses a standardized or nonstandardized prototype document, the plan may not apply for an individual determination letter but instead can rely on the prototype document's IRS opinion letter. If your plan uses a volume submitter document that has been modified, but not so extensively as to be considered an individually designed plan document, you may apply for an individual determination letter for the plan using Form 5307. The Form 5307 can be submitted at any time from May 1, 2014 through April 30, 2016.

### PPA Restatement Changes

Since the IRS approved the EGTRRA restatements in 2007, several pieces of legislation and regulations issued by the IRS have required amendments to pre-approved plan documents. These amendments, referred to as "interim amendments", were previously required to be adopted at various deadlines and addressed the following legislation and regulations:

- Final 415 Treasury regulations, the Katrina Emergency Tax Relief Act of 2005;
- The Gulf Opportunity Zone Act of 2005, the PPA;
- The Heroes Earnings Assistance and Tax Relief Act of 2008 ("HEART"); and
- The Worker, Retiree, and Employer Recovery Act of 2008 ("WRERA").

The new PPA restatements incorporate those amendments into the terms of the pre-approved plan documents.

## PPA Restatement Process

We are aware that many providers of pre-approved documents are beginning to contact plan sponsors to notify them that the plans will be restated onto the new PPA restatement document. If you use a pre-approved document but have not been contacted by the provider of the pre-approved document, we suggest that you proactively contact them and ask when you can expect a copy of your restated plan document for review. You can also review the IRS [list of pre-approved plans](#) on the IRS website to determine if the IRS has issued an opinion or advisory letter for your pre-approved plan document. The IRS updates the list from time-to-time as the IRS issues additional letters.

While the PPA restatement document may look very similar to the EGTRRA restatement document, it is important that you review the new restatement in detail to ensure

not only that the new document properly reflects the interim amendments' provisions, but also that the individual selections not affected by the interim amendments are properly drafted. While pre-approved plan sponsors make every effort to prepare restated documents accurately, errors can occur; for instance, if the plan sponsor's selections regarding categories of excluded employees are not carried over from one document to the next. In that case, employees that are not intended to be eligible to participate in a plan may inadvertently become eligible, potentially resulting in an operational error that can affect the plan's qualified status. In addition, if the plan sponsor would like to make changes in the plan design in conjunction with the restatement process, you should review the documents to confirm that the intended changes are properly implemented in the terms of the new document.

For assistance reviewing your PPA restatement, don't hesitate to contact any of the Trucker + Huss attorneys.

## OTHER DEVELOPMENTS IN EMPLOYEE BENEFITS

### IRS Issues Draft Forms for the Reporting of Coverage under the Affordable Care Act

On July 24, 2014, the Internal Revenue Service ("IRS") released draft forms for review and comment implementing the reporting requirements under Sections 6055 and 6056 of the Internal Revenue Code (the "Code") (Please see our [May 2013](#) and [March 2014](#) newsletters for detailed discussions of these reporting requirements). Section 6055 requires health coverage providers (including plan sponsors of self-insured group health plan coverage) to report the coverage provided in the prior calendar year to allow the IRS to administer the individual shared responsibility requirement under Section 5000A of the Code, while Section 6056 requires employers with the equivalent of more than 50 full-time employees to report coverage offered to full-time employees in the prior calendar year. This report enables the IRS to administer the employer shared responsibility provision under Section 4980H of the Code.

While the IRS has yet to issue accompanying instructions, the draft forms offer insight into what employers and other plan sponsors will be required to report to the IRS in 2016 for coverage provided in 2015. The following draft forms are available for review:

Section 6055 Reporting by Coverage Providers (Note: Forms below do not apply to employers as combined reporting is permitted)

- Form 1094-B (Transmittal of Health Coverage Information Return — to be filed with IRS with Form 1095-B by a provider of coverage, for example, insurer of employer-sponsored coverage or sponsor of self-funded multiemployer plan coverage):

<http://www.irs.gov/pub/irs-dft/f1094b--dft.pdf>

- Form 1095-B (Health Coverage — to be filed with IRS with Form 1094-B, for example, by an insurer of employer-sponsored insured coverage or sponsor of self-funded multiemployer plan coverage):  
<http://www.irs.gov/pub/irs-dft/f1095b--dft.pdf>

Section 6056 Reporting (Filed by Employers)

- Form 1094-C (Transmittal of Employer-Provided Health Insurance Offer and Coverage Information Return — to

be filed with IRS by an employer with Form 1095-C):  
<http://www.irs.gov/pub/irs-dft/f1094c--dft.pdf>

- Form 1095-C (Employer Provided Health Insurance Offer and Coverage — to be filed with IRS with Form 1094-C by an employer. Note: This form allows for combined reporting under Sections 6055 and 6056):  
<http://www.irs.gov/pub/irs-dft/f1095c--dft.pdf>

— TIFFANY N. SANTOS

## FIRM NEWS

On August 26, **Callan Carter** will be co-presenting a BLR webinar entitled, *Employee Benefits for Same Sex Couples: FMLA Eligibility, Healthcare Coverage, Taxes & Other Post-Windsor Updates*.

On July 16, **Bob Schwartz** discussed employer withdrawal liability issues on a panel covering public and private sector pensions at NLRB Region 21 and Region 31's 32nd Annual Labor and Employment Law Conference in Anaheim, CA.

The Trucker ♦ Huss *Benefits Report* is published monthly to provide our clients and friends with information on recent legal developments and other current issues in employee benefits. Back issues of *Benefits Report* are posted on the Trucker ♦ Huss web site ([www.truckerhuss.com](http://www.truckerhuss.com)).

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In response to new IRS rules of practice, we inform you that any federal tax information contained in this writing cannot be used for the purpose of avoiding tax-related penalties or promoting, marketing or recommending to another party any tax-related matters in this *Benefits Report*.

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