

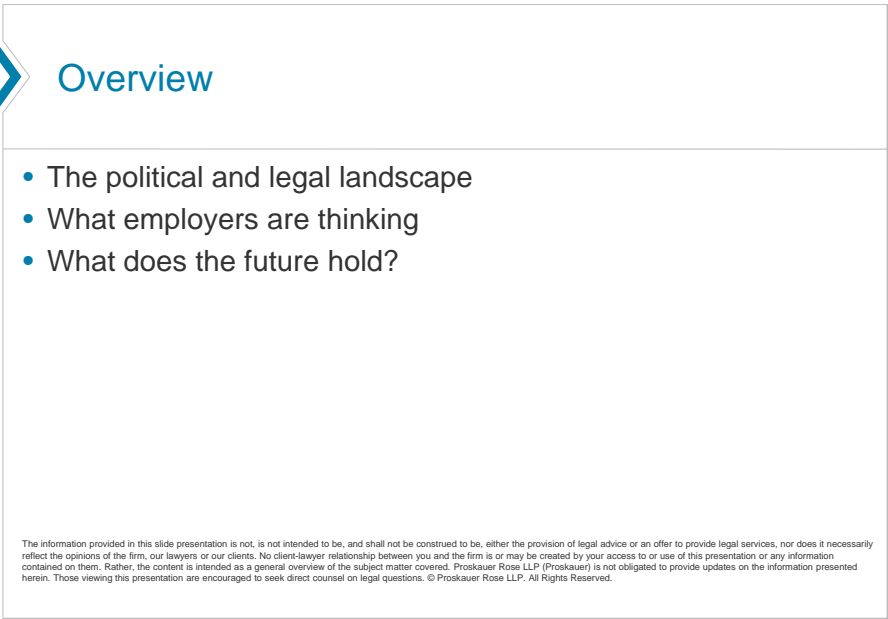


Health Reform: Where We Stand

James R. Napoli  
September, 2011

Proskauer

The slide features a photograph of the White House in Washington, D.C., under a clear blue sky. A large blue arrow graphic points to the right, partially overlapping the title text. A semi-transparent blue box in the lower right corner of the image contains the speaker's name and the date. The Proskauer logo is located in the bottom right corner of the slide frame.



Overview

- The political and legal landscape
- What employers are thinking
- What does the future hold?

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This slide has a white background with a blue arrow graphic pointing to the right. The title 'Overview' is in a large, bold, blue font. Below the title is a list of three bullet points. At the bottom of the slide, there is a small block of disclaimer text and the Proskauer logo.



## The Political and Legal Landscape

- What is happening at the agencies?
- What is happening on the Hill?
- What is happening in the courts?



## Legislative Update





- Is it going away?
  - HR 2: "An Act to repeal the job-killing health care law"
  - HR 9: "Instructing certain committees to report legislation replacing the job-killing health care law"
- Enacted Legislation
  - Repeal of Vouchers
  - 1099 Correction
- Other Areas Being Considered
  - Elimination of OTC Prescription Drug Requirement
  - Elimination of CLASS Act
  - Medical Loss Ratio Changes

## Legislative Update


- ❑ Budget Control Act of 2011
  - ❑ Passed August 2, 2011
  - ❑ Increased the federal debt limit
  - ❑ Created Joint Select Congressional Committee charged with developing a plan to cut deficit by \$1.5 trillion
    - ❑ Failure to do so will result in automatic budget sequestration in 2013
    - ❑ Sequestration is an across-the-board cut in federal spending
      - ❑ Likely cut spending for the Exchanges and subsidies

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## Judicial Update

- ❑ Is it legal? Many constitutional challenges
- ❑ Suits filed in most states; five federal court decisions:
  - ❑ Thomas More Law Center v. Barack Obama, et al. (MI)
  - ❑ Liberty University v. Timothy Geithner (VA)
  - ❑ Mead v. Holder (DC)
  - ❑ Commonwealth of Virginia v. Sebelius (VA)
  - ❑ Florida v. Dept. of Health and Human Services (FL)
    - ❑ 22 Attorneys General
    - ❑ 4 Governors

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## Judicial Update




- ❑ On June 29<sup>th</sup>, the 6th Circuit Court in *Thomas More Law Center v. Obama* ruled that the individual mandate is a **valid exercise** of congressional authority under the Commerce Clause
- ❑ The Court found that:
  - ❑ The individual mandate is within Congress' power to regulate economic activity that has a substantial effect on interstate commerce, even if such activity is wholly intrastate
  - ❑ The Commerce Clause permits Congress to regulate non-economic intrastate activity (e.g., individuals who, through "inaction," fail to comply with the individual mandate) if doing so is essential to a larger scheme that regulates economic activity (e.g., health care reform)


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## Judicial Update



- ❑ On August 12<sup>th</sup>, the 11th Circuit Court in *Florida v. Dept. of Health and Human Services* ruled that the individual mandate **exceeds** Congress' power under the Commerce Clause
- ❑ The Court found that:
  - ❑ PPACA's Medicaid expansion provisions are not unconstitutionally coercive, and thus are valid spending conditions
  - ❑ The individual mandate exceeds Congress' authority to regulate interstate commerce
  - ❑ The individual mandate is not a valid exercise of the tax power
  - ❑ The individual mandate can be severed from the rest of PPACA, so only the individual mandate itself (and nothing else) is invalidated


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## Judicial Update



- ❑ On September 8, 2011, the Fourth Circuit Court dismissed *Virginia ex rel. Cuccinelli v. Sebelius and Liberty University, Inc. v. Geithner* on jurisdictional grounds.
- ❑ The Court found that:
  - ❑ District court lacked jurisdiction to hear the *Liberty University* case because the Anti-Injunction Act<sup>11</sup> prevents federal courts from deciding the legality of a tax or other exaction that hasn't been collected yet.
  - ❑ In *Virginia ex rel. Cuccinelli*, the State of Virginia did not have the legal right or "standing" to sue. States are generally barred from suing the federal government on behalf of their.

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## What are Employers Thinking



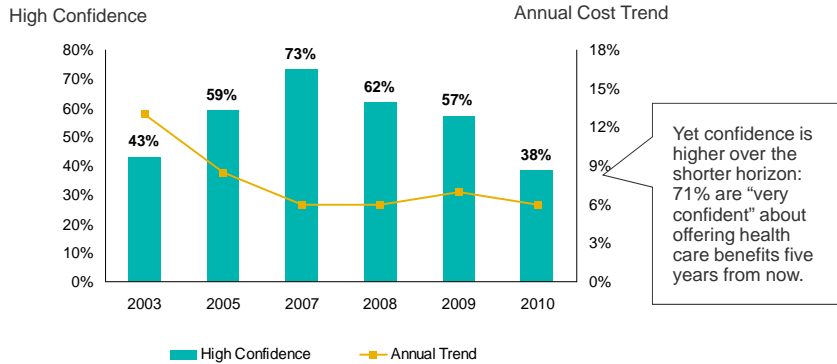
- 2011 Towers Watson/NBGH Employer Survey on Purchasing Value in Health Care - Select Findings:
  - Employers are less confident they will offer health care benefits a decade from now
  - Employers' commitment to providing health care benefits for active employees remains strong
  - However, health care reform could accelerate the exit from retiree medical programs
  - Nearly three-quarters (71%) of respondents expect the opening of the exchanges in 2014 to have an impact on their active programs, and even more (78%) expect it will impact their retiree programs
  - This last year marked a twofold increase in incentive designs that pinpoint specific outcomes standards, and another 33% plan to adopt such measures in 2012

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## Employers are Less Confident They Will Offer Health Care Benefits a Decade From Now

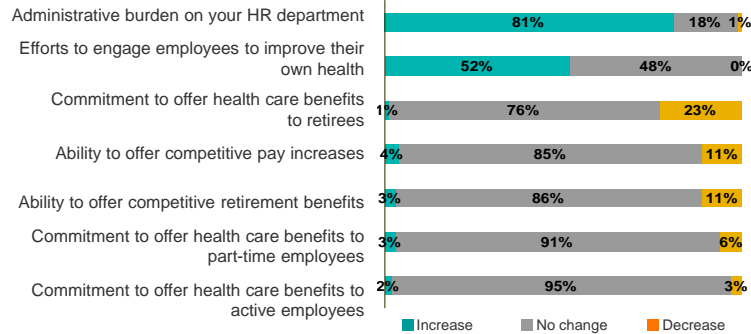
- Confidence is below levels reported in 2003, when health care cost trends were upwards of 13%



Note: "High confidence" represents responses of "very confident."  
 Source: 2011 Towers Watson/NBGH Employer Survey on Purchasing Value in Health Care

## Changes Due to Health Care Reform

- Employers' commitment to providing health care benefits for active employees remains strong
- However, health care reform could accelerate the exit from retiree medical programs



Note: Data excludes respondents indicating "NA."  
 Source: 2011 Towers Watson/NBGH Employer Survey on Purchasing Value in Health Care



## Implementation Issues

- Building the Infrastructure to Support Reform's Mandates
  - Review the design of your employer-sponsored health benefit delivery system
  - Systems upgrades and testing
  - Review plan documents, SPDs and enrollment materials
  - Review provider agreements
  - Keep in mind fiduciary structure



## Mandates for Grandfathered Plans Too

- **First plan year after September 23, 2010:**
  - No annual or lifetime dollar limit on essential benefits (with certain restricted annual limits permitted)
  - Child coverage to age 26 (if not eligible for other employer coverage for grandfathered plans)
  - No rescission except for fraud or intentional misrepresentation
  - No preexisting condition exclusions for children under age 19
- **March 23, 2012:**
  - Uniform standards for certain benefits communications
- **First plan year beginning in 2014:**
  - No more restricted annual dollar limits
  - Child coverage to age 26 regardless of other coverage
  - No preexisting condition exclusions at all
  - No waiting periods over 90 days
  - Change in rules on wellness incentives

## Mandates for Non-Grandfathered Plans

- **First plan year after September 23, 2010:**
  - No cost sharing for preventive care and immunization
  - Internal and external appeal process
  - Must allow pediatrician as child's PCP
  - Must allow women to choose OB-GYN without referral
  - No prior authorization for emergency care and must treat similar to in network
  - Nondiscrimination for insured plans under IRC 105(h) (in addition to current rules for self-insured)
- **March 2012**
  - Quality of care reporting to HHS
- **2014**
  - Insured plan reform (ratings limits, guaranteed issue and renewability, cover essential benefits)
  - No discrimination against participation in clinical trial
  - No discrimination on health care providers acting within scope of license
  - Limits on deductibles and out of pocket

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## Anticipated Impact of Health Care Reform on Active and Retiree Medical Plans

• Nearly three-quarters (71%) of respondents expect the opening of the exchanges in 2014 to have an impact on their active programs, and even more (78%) expect it will impact their retiree programs

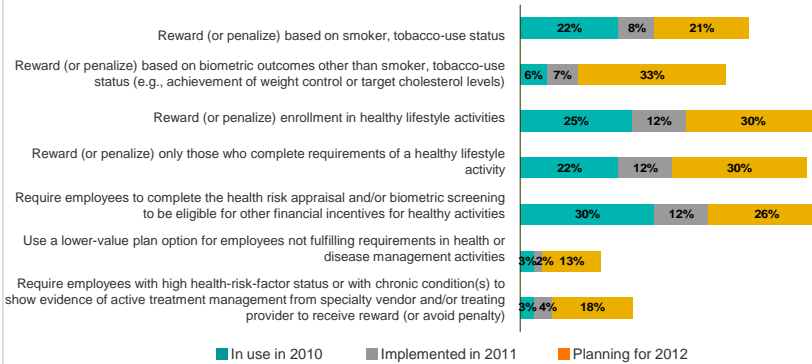
Event	Group	Extensively	Somewhat	Not at all
Opening of insurance exchanges in 2014	Actives	9%	62%	30%
	Retirees	27%	51%	22%
Implementation of excise tax in 2018	Actives	24%	57%	19%
	Retirees	20%	46%	34%
Ending of the tax advantages of the Medicare Part D subsidy in 2014	Actives	22%	40%	38%
	Retirees	16%	50%	34%

Note: Responses to retiree programs based on companies that offer a retiree program today  
Source: 2011 Towers Watson/NBGH Employer Survey on Purchasing Value in Health Care  
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## Companies Continue to Raise the Bar on Wellness Incentives

- This last year marked a twofold increase in incentive designs that pinpoint specific outcomes standards, and another 33% plan to adopt such measures in 2012



Source: 2011 Towers Watson/NBGH Employer Survey on Purchasing Value in Health Care  
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## Wellness Programs – Laws Most Commonly Implicated

Law	Prohibits	Applies to	Things to think about
<b>HIPAA</b>	<ul style="list-style-type: none"> <li>Discrimination in health plan based on health status-related factor</li> <li>Standards-based program unless it meets criteria for a HIPAA compliant program</li> </ul>	<ul style="list-style-type: none"> <li>Incentive or surcharge under health plan for improving health status</li> <li>Standard or outcome based programs</li> </ul>	<ul style="list-style-type: none"> <li>Misconception- HIPAA wellness criteria applies to all wellness arrangements</li> <li>Does not apply to participation-only (outcome irrelevant)</li> <li>Does not apply to employment policies</li> </ul>
<b>ADA</b>	<ul style="list-style-type: none"> <li>Disability-related questions and medical examinations unless purpose is job related, consistent with business necessity or part of voluntary wellness program</li> </ul>	<ul style="list-style-type: none"> <li>Programs and activities that will elicit information about a disability</li> </ul>	<ul style="list-style-type: none"> <li>EEOC informal opinion letter that mandated HRA to receive health coverage is not compliant</li> <li>Letter calls into question financial incentives</li> </ul>
<b>GINA</b>	<ul style="list-style-type: none"> <li>Health plan from requesting, requiring or purchasing information before enrollment or for underwriting purposes</li> <li>Employer from discriminating based on genetic information</li> </ul>	<ul style="list-style-type: none"> <li>Incentives offered to complete HRAs with family history questions</li> <li>Requests for genetic test</li> </ul>	<ul style="list-style-type: none"> <li>Wellness plan exception</li> <li>Incentives for completing HRA with family history questions problematic</li> </ul>
<b>Tax</b>	<ul style="list-style-type: none"> <li>Salary, wages or other benefits offered in an employment arrangement from being excluded from gross income unless specifically excluded under the IRC</li> </ul>	<ul style="list-style-type: none"> <li>Cash or anything with a face value</li> </ul>	<ul style="list-style-type: none"> <li>Gift cards, certificates or cash bonuses are included in employee's gross income</li> <li>Tax excludable incentives</li> </ul>

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## > Risk Level of Certain Wellness Programs

Program Element	Risk Level
<b>Access to Information and Counseling.</b> Employees receive wellness magazine and have access to a website with health information. Employees can obtain free health screenings and everyone can take an HRA online, with follow-up available from a health counselor.	<b>No Apparent Risk</b>
<b>Financial Incentive to Identify and Reduce Health Risks.</b> Offers a \$600 premium discount to employees who complete online health questionnaire and sign a pledge to exercise more.	<b>Low Risk</b>
<b>Higher Premiums for Smokers.</b> Employer charges higher premiums to smokers.	<b>Medium Risk</b>
<b>Disadvantageous Copay for Employees with At Risk Behaviors.</b> Employer provides less favorable copay arrangement for employees who do not show they have controlled weight and/or cholesterol.	<b>High Risk</b>
<b>Terminating Smokers.</b> Employer abolished smoking from corporate campus and told employees to quit or face termination.	<b>Very High Risk</b>

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## > What Does the Future Hold?



- Healthcare Delivery Decisions
  - Does the employer stay in the business of healthcare?
- Plan Design Changes
  - Increased adoption of consumer driven plan designs
  - Increased adoption of wellness programs
  - Decrease in retiree medical coverage
- Continued Involvement of the Courts
- Continued Political Wrangling

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## Questions?

May 2011  
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- **James R. Napoli** is a Senior Counsel in the Washington, D.C. office of Proskauer Rose LLP, where he chairs the Firm's Health Care Reform Task Force. Mr. Napoli counsels employers on all aspects of their employee benefit programs, including matters affecting tax-qualified retirement plans (such as 401(k) plans, cash balance pension plans, traditional defined benefit plans, and other retirement plan designs); executive compensation plans; and welfare benefit plans (including cafeteria plan, COBRA and other group health plan issues). He partners with clients to assist them in the design, implementation and maintenance of their employee benefit programs. This includes assisting clients in managing third-party service provider relationships; counseling clients on the implementation of fiduciary hierarchies to achieve optimum administrative efficiencies and protections; and counseling clients on ongoing compliance issues. Mr. Napoli is experienced in representing clients before the Internal Revenue Service, Department of Labor and Pension Benefit Guaranty Corporation. In addition, he has experience litigating matters involving claims to benefits and breach of fiduciary duty under ERISA. Mr. Napoli is a frequent speaker on employee benefit matters, including a series of webinars and lectures on Health Care Reform. He is the managing author of "The New Health Care Reform Law - What employers Need to Know," published by AHC Media LLC, and has authored numerous articles and other publications on employee benefit matters.

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## Health Care Reform: Where We Stand



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