

Healthcare Reform & Benefits Update

Compliance Challenges and Opportunities

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ROADMAP

- [A Long Strange Trip](#): Timeline of effective dates...for now.
- [What's On the Road Ahead](#): Provisions taking effect in 2015.
- [What's Our Final Destination](#): Other post-2014 PPACA requirements.
- [Appendix - Places Where the Maps Converge](#): Update on some uncharted issues relating to health plans and employee benefits.

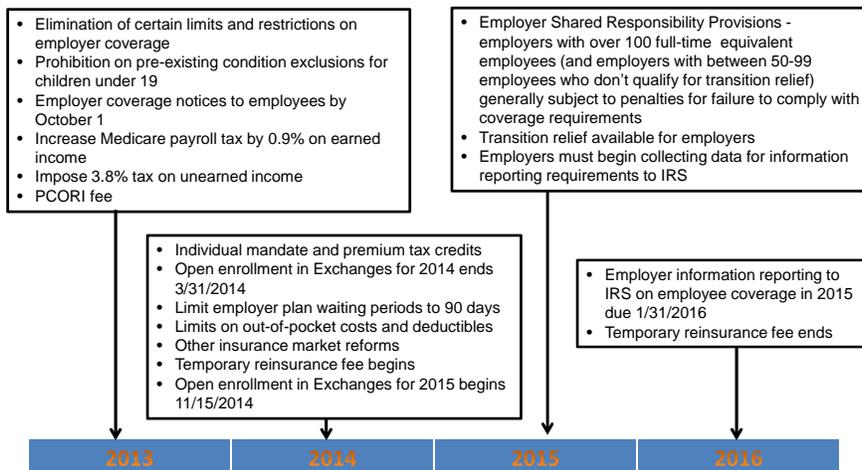
HEALTHCARE REFORM

A long, strange trip...

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TIMELINE OF EFFECTIVE DATES



HEALTHCARE REFORM

What's on the road ahead....

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EMPLOYER SHARED RESPONSIBILITY PROVISIONS

- As described in more detail below, employer shared responsibility provisions and potential penalties only apply to “applicable large employers” (ALEs) with 50 or more full-time equivalent employees.
- Provisions for enforcement and assessment of employer shared responsibility penalties originally scheduled to take effect January 1, 2014 were delayed one year.
- The delay has been extended until 2016 for certain employers with fewer than 100 full-time equivalent employees who certify in writing that they meet the conditions for transition relief.
- Final regulations issued on February 10, 2014. Items marked “[*added by Final Regs*]” indicate changes to the proposed regulations issued in late 2012.

QUESTION - IF YOU ARE AN EMPLOYER, DO YOU CURRENTLY QUALIFY AS AN "ALE"?

- A. Yes
- B. No
- C. We are currently determining our status
- D. We have not started, or have postponed until later this year to determine our status

WHO IS "ALE" FOR 2015

- For 2015, ALE is an employer that averages 100 or more full-time employees on business days in 2014 *[added by Final Regs]*.
 - ALE also will include an employer that averages 50 – 99 full-time equivalent employees in 2014 unless the employer meets the conditions described on the next slide *[added by Final Regs]*
- IMPORTANT: ALE status is determined on a controlled group basis!
- Formula: Add full-time employees (including seasonal) for each month plus full-time equivalent employees (including seasonal) for each month and divide by 12.
 - Full-time equivalents determined by adding up hours for all part-time employees for a month and dividing by 120.
 - Seasonal employee exception: If employer was an ALE for less than 120 days in previous calendar year and it was seasonal employees that pushed employer over the 50 full-time employee threshold, employer can exclude seasonal employees.

WHO IS "ALE" FOR 2015

- An employer that averages 50 – 99 full-time equivalent employees on business days during 2014 will NOT be an ALE for 2015 provided the following conditions are met [*added by Final Regs*]:
 - From 2/9/14 to 12/31/14, the employer cannot reduce its workforce or the overall hours of service of its employees to qualify for the transition relief (unless reductions in workforce or hours are permitted by IRS for bona fide business reasons); and
 - From 2/9/14 to 12/31/15 (or for non-calendar year plans, the last day of the 2015 plan year), the employer does not eliminate or materially reduce health coverage, if any, it offered as of 2/9/14.

WHO IS "ALE" FOR 2015

- An employer will not be treated as eliminating or materially reducing health coverage if all of the following activities occur:
 - It continues to pay a portion of the premium for employee-only coverage that is either at least 95% of the dollar amount or at least the same percentage of the employer contribution towards such coverage in effect on 2/9/14
 - Employee-only coverage offered after any change in benefits continues to provide "minimum value"
 - The eligibility terms of its group health plans are not narrowed or reduced.

POTENTIAL PENALTIES: “SLEDGEHAMMER”

- Does not mandate coverage, but imposes penalties if ALE does not provide a prescribed level of coverage.
- “Sledgehammer” penalty applies if:
 - The ALE does not offer “minimum essential coverage” to at least 70%*[added by Final Regs]* (95% after 2015 *[added by Final Reg]*) of its full-time employees and their dependent children; and
 - At least one full-time employee receives a tax credit or subsidy and purchases coverage through the Marketplace.
- Penalty = \$2,000 x (# of FT employees minus 80 [30 in 2016]).
- Note that only “minimum essential coverage” must be offered to avoid sledgehammer penalty.
 - Can be unaffordable and not provide minimum value.
 - Need not satisfy essential health benefit requirements.
 - Cannot be HIPAA excepted benefits (i.e., an FSA, fixed indemnity).

POTENTIAL PENALTIES: “TACK HAMMER”

- “Tack Hammer” penalty applies if:
 - Coverage is offered to at least 70% *[added by Final Regs]* (95% after 2015 *[added by Final Regs]*) of full-time employees and their dependent children;
 - Cost of coverage to a full-time employee either is not “affordable” for that employee or does not provide “minimum value”; and
 - Such full-time employee receives a tax credit or subsidy and purchases coverage through the Marketplace.
- Penalty = \$3,000 for each subsidized full-time employee.
 - Capped at total amount of Sledgehammer penalty.

POTENTIAL PENALTIES

- Although ALE status is determined on a controlled group basis, penalties are assessed against the individual controlled group member based on its workforce.
- The 80 [*added by Final Regs*] (30 after 2015 [*added by Final Regs*]) “freebie” employees are prorated among the controlled group members.

HYPOTHETICAL SCENARIO 1

- Company A has 150 FT employees and Company B has 50 FT employees
- Company A and Company B are in a controlled group and do not qualify for transition relief in 2015 because the two companies combined employed more than 100 employees during 2014
- Company A provides affordable, minimum value coverage to at least 70% of its full-time employees (and their children up to age 26)
- Company B provides no coverage to its employees
- **Question: Assuming at least one of Company B’s employees obtains coverage through the Marketplace and receives a subsidy for such coverage, what is the combined amount of penalties that Company A and Company B will be assessed?**

- A. \$40,000
- B. \$60,000
- C. \$84,000
- D. \$100,000

POTENTIAL PENALTIES

- Employer must only “offer” coverage to full-time employees (no need to force employees to enroll).
 - “Full-time” = 30 hours of service per week (or 130 hours per month).
- Employer must offer coverage to the “dependents” of full-time employees.
 - “Dependents” = children up to age 26 (but not foster children and step children *[added by Final Regs]*).
 - “Dependents” does not include spouses.
 - The requirement that employers offer coverage to full-time employees' dependents in order to avoid potential penalties will not apply in 2015 to employers that are taking steps to arrange for such coverage in 2016 *[added by Final Regs]*.
- Only full-time employees who receive a tax credit or subsidy and who obtain coverage through the Marketplace can trigger a penalty.
- IRS is working on final regulations regarding reporting requirements and we anticipate that those will be published soon.

AFFORDABILITY STANDARDS

- “Affordable”: Required contribution does not exceed 9.5% of the employee’s “household income”.
 - Based on self-only coverage.
 - Can be based on lowest cost benefit option that provides minimum value.
- 3 Safe-harbors to determine “household income”:
 - W-2
 - Rate of pay
 - Federal poverty line

HYPOTHETICAL SCENARIO 2

- Company offer minimum value coverage to its full-time employees. An employee's monthly cost of coverage is as follows:
 - Single person coverage: \$300
 - Two person coverage: \$600
 - Family coverage: \$1200
- Company uses the W-2 safe harbor to determine whether its coverage is affordable.
- Employee A is enrolled in Family coverage. Employee A's W-2 wages are \$50,000 annually.
- **Question: Is Company's coverage "affordable" for Employee A?**
 - A. Yes
 - B. No

MINIMUM VALUE

- "Minimum Value": Plan's share of total allowed costs of benefits is at least 60% of such costs ("Bronze Level" plan).
- 3 approaches for determining Minimum Value:
 1. Minimum Value calculator
 2. Design-based safe harbors
 3. Actuarial certification

FINAL REGS: WHAT ELSE IS NEW OR HAS CHANGED?

- “Minimum Value”: Plan’s share of total allowed costs of benefits is at least 60% of such costs (“Bronze Level” plan).
- 3 approaches for determining Minimum Value:
 1. Minimum Value calculator
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FINAL REGS: WHAT ELSE IS NEW OR HAS CHANGED?

- Final Regs keep the “look-back” measurement method of determining an employee’s full-time status.
- A new “monthly measurement method” has been added (can be used by employers who do not want to use the look-back method).
 - Full-time employees are identified based on the hours of service for each month.

FINAL REGS: WHAT ELSE IS NEW OR HAS CHANGED?

- Final regulations clarify issues with classifying employees for purposes of determining which employees are considered full-time.
- New factors to consider in determining whether an employee is “variable”:
 - Whether the employee is replacing an employee who was a full-time employee or a variable hour employee
 - The extent to which the hours of service of employees in the same or comparable positions have actually varied
 - Whether the job was advertised as requiring hours of service that would vary above and below an average of 30 hours of service per week

FINAL REGS: WHAT ELSE IS NEW OR HAS CHANGED?

- New definition of “seasonal employee” for purposes of determining whether an employee is full-time: an employee in a position for which the customary annual employer is six months or less.
- Final Regs also add a new “part-time” employee definition (i.e., an employee not expected to be full-time and who is neither seasonal nor variable).
 - Final Regs also clarify that the same rules apply to new part-time employees as they do to new variable hour or seasonal employees.
- Final Regs do not adopt any specific provisions for short-term employees who are not seasonal nor for employees in high-turnover positions.

FINAL REGS: WHAT ELSE IS NEW OR HAS CHANGED?

- Final Regs clarify provisions regarding offers of coverage and professional employer organizations (“PEOs”) or staffing firm.
 - An offer of coverage is treated as made on behalf of a client employer only if the fee the client employer would pay to the staffing firm or PEO for an employee enrolling in health coverage under the staffing firm or PEO’s plan is higher than the fee the client would pay to the staffing firm or PEO for the same employee if the employee did not enroll in health coverage under the plan.

FINAL REGS: WHAT ELSE IS NEW OR HAS CHANGED?

- Final Regs clarify “hours of service” for educational institution employees.
 - Adjunct faculty: Credit 2 ¼ hours of service per week for each hour of teaching or classroom time, plus an hour of service per week for each additional hour outside the classroom (such as office hours or attendance at faculty meetings).
 - Student work-study: Do not count hours of service performed by students under a federal or state sponsored work-study program.

FINAL REGS: WHAT ELSE IS NEW OR HAS CHANGED?

- Final Regs carry over much of the same transitional relief as under the proposed regulations:
 - For purposes of determining employer size, in 2015 employers can determine the number of full-time equivalent employees in the previous year by reference to a period of at least six consecutive months in 2014, instead of the full calendar year.
 - Employers with non-calendar year plans will be able to begin compliance with the employer shared responsibility provisions at the start of their plan years in 2015 instead of January 1, 2015.
 - On a one-time basis, in 2014 preparing for 2015, plans may use a measurement period of six months and still be permitted to take advantage of a longer (e.g. 12 month) stability (or coverage) period.

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What is our final destination: Future Post 2014 PPACA
Requirements and Next Steps

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FUTURE PPACA REQUIREMENTS

Insured Plan Non-Discrimination Testing	Automatic Enrollment	Cadillac Plans
<ul style="list-style-type: none">• Self-insured plans are already subject to non-discrimination testing rules under IRC 105(h).• Effective date indefinitely delayed.	<ul style="list-style-type: none">• Employers with more than 200 full-time employees must automatically enroll employees in coverage.• Effective date indefinitely delayed.	<ul style="list-style-type: none">• 40% excise tax on “Cadillac” health plans with aggregate annual value amounts that exceed \$10,200 for individual coverage and \$27,500 for family coverage (indexed annually), Based on total cost of benefits, not just what employer pays (shifting more cost to employees does not get employer out of tax).• Effective January 1, 2018.

NEXT STEPS

- Review your organization's plans and workforce:
 - Determine which plans are subject to PPACA.
 - Update/amend coverage and documentation as needed to comply with requirements.
 - Work with your insurance carriers, third party administrators and benefits advisors to make sure everyone is in compliance and on the same page.
 - Develop a communication plan to keep employees informed and to highlight the benefits you offer to employees.

STRATEGIES FOR MINIMIZING EMPLOYER SHARED RESPONSIBILITY PENALTIES

- Offer affordable, minimum value coverage to all employees?
 - Avoids both the “sledgehammer” and “tack hammer” penalties.
- Eliminate coverage?
 - Large savings.
 - Sledgehammer penalty (which is nondeductible).
- Offer only “minimum essential coverage” that does not provide minimum value and/or is 100% employee paid?
 - Avoids the sledgehammer penalty, but does not avoid the tack hammer penalty.
- Restructure workforce?
 - Keep hours below 30?
 - Risk of ERISA claims (benefit interference),
 - Whistleblower claims.

DEVELOP AN IMPLEMENTATION PLAN

- Will your plans meet the affordability and minimum value standards?
- Will your plans meet the “minimum essential health plan coverage” standards?
- Do you offer benefits to at least 70% of your full-time employees and their dependent children?
- What Measurement, Stability, and Administrative Periods will you use?
- Do you need to consider reducing benefits to avoid the Cadillac Tax in 2018?
- Do you have insured plans or severance arrangements with post-employment benefit coverage that will likely run afoul of the nondiscrimination requirements?
- If you have union employees, does your CBA have a reopener clause that allows you to clarify new health care requirements without negotiating other terms?

THANK YOU



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Note: This document is not intended to give legal advice. It is comprised of general information. Employees facing specific issues should seek the assistance of an attorney.

APPENDIX

Places Where the Maps Converge: Update on some uncharted issues relating to health plans and employee benefits

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UNCHARTED ISSUES IN EMPLOYEE BENEFITS

- Windsor changes tax treatment of health plan coverage for married same-sex couples
 - Under Windsor, employer health plans can now offer coverage of same-sex partners on a pre-tax basis, if the couple is lawfully married under state law
 - The IRS adopted rules generally recognizing same-sex marriages as long as the marriage was entered into in a state (or foreign country) that recognizes same-sex marriage, even if the couple is living in a state that does not recognize such marriages
 - Impacts COBRA eligibility, HIPAA special enrollment elections and FSA distributions; also affects spousal and survivor rights under qualified retirement plans

UNCHARTED ISSUES IN EMPLOYEE BENEFITS

Administrative issues under Windsor

- The maximum annual limits on FSAs and HSAs will apply to married same-sex couples; excess contributions for 2013 may be distributed to the employee before April 15
- Employers may apply for employment tax (e.g., FICA, FUTA) refunds for open tax years; IRS guidance adopts certain special administrative rules to streamline the application process; refund claims for 2010 must be submitted by April 15, 2014
- States are not required to recognize same-sex couples for state tax purposes, so this may lead to separate tax regimes for federal and state/local purposes
- Cafeteria plans and other welfare programs may need to be amended to reflect Windsor, but retroactive amendments can be made until December 31, 2014

UNCHARTED ISSUES IN EMPLOYEE BENEFITS

- FICA Taxation of Severance Pay
 - The Supreme Court will decide whether the payment of certain severance benefits should be exempt from FICA taxation
 - Despite language in the FICA statute indicating that severance pay is exempt from FICA taxes, the IRS has narrowly limited that exclusion to very specialized severance benefits
 - The Sixth Circuit Court of Appeals recently ruled against the IRS position and held that severance benefits payable in connection with a reduction in force (RIF) were not subject to FICA tax; not surprisingly, the IRS appealed and the case will be heard by the Supremes later this year
 - While the case may go either way, employers who paid severance in connection with a RIF or other involuntary termination in 2010 or later should consider applying for a refund of FICA taxes prior to end of the applicable limitations period on April 15th of this year

ANSWERS TO HYPOTHETICAL SCENARIOS

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HYPOTHETICAL SCENARIO 1

- Company B would be assessed the Sledgehammer penalty because it provides no coverage and at least one of its employees obtained subsidized coverage.
- Company B's employees equal one-quarter of the controlled group's total employees, so Company B is allowed 20 "freebie" employees for 2015 when the penalty is calculated ($1/4$ of 80 = 20). Company B's penalty would equal $\$2,000 \times (50 \text{ employees} - 20 \text{ "freebie" employees}) = \$60,000$.
- Company A is not subject to any penalties.

HYPOTHETICAL SCENARIO 2

- Company's coverage is "affordable" for Employee A.
- Even though Employee A is paying 28.8% of his W-2 wages towards the cost of his family coverage $[(\$1,200 \times 12)/\$50,000]$, "affordability" is determined on self-only coverage.
- Applying the cost of self-only coverage (\$300), Employee A is "paying" only 7.2% of his W-2 wages $[\$300 \times 12)/\$50,000]$.