

Healthcare Reform Update: What Employers Need to Know

Pittsburgh Employment Law Conference

Douglas J. Ellis

October 2, 2014

CLARK HILL

AGENDA

- ACA Litigation Update
- Important ACA provisions that apply to all employers regardless of size
- Determining whether you are an Applicable Large Employer (“ALE”)
- Update on the employer shared responsibility provisions applicable to ALEs
- Q&A

ACA LITIGATION UPDATE

Burwell v. Hobby Lobby Stores, Inc.: The U.S. Supreme Court decided that, as applied to closely-held corporations, Department of Health and Human Services regulations requiring employers to provide female employees with no-cost access to contraception violates the Religious Freedom Restoration Act to the extent the regulations impose a substantial burden on the corporation's ability to exercise religious beliefs. Proposed regulations were recently issued extending a safe harbor from enforcement of the contraception mandate to include "qualifying closely-held for-profit entities" that object to providing some or all such coverage based on religious beliefs.

Halbig and King Cases: Two federal appeals courts issued conflicting rulings on whether individual premium subsidies under PPACA are available in states (36 of them) that have federal insurance exchanges. The D.C. Circuit, in *Halbig v. Burwell*, said such subsidies are not available under the law, while the Fourth Circuit Court of Appeals disagreed and said they are in *King v. Burwell*. The D.C. Circuit has granted a rehearing of the *Halbig* case before the full appeals court.

ACA LITIGATION UPDATE

EEOC v. Orion Energy Sys.: EEOC sued Orion Energy over Orion's wellness program, claiming Orion penalized and eventually fired an employee who refused to participate in the wellness program requiring the employee to complete a health risk assessment and participate in a fitness program.

- EEOC has raised concerns over whether certain wellness program designs could violate the ADA or other nondiscrimination laws or regulations such as HIPAA and GINA.
- Regulations issued under the ACA permit wellness programs to reduce premiums by up to 30%, but caution should be used in structuring a wellness program to avoid violating EEOC rules.

ACA PROVISIONS APPLICABLE TO EMPLOYERS REGARDLESS OF SIZE

CLARK HILL

WAITING PERIODS – FINAL REGULATIONS

- Coverage under a group health plan must be made available to otherwise eligible employees and their dependents no later than 90 calendar days from the employee's eligibility date
- Effective for plan years beginning on and after January 1, 2015
- 90 days means 90 days!
- Applies to all employers and group health plans, including grandfathered health plans and self-insured health plans
- Update plan documents and Summary Plan Descriptions

WAITING PERIODS – FINAL REGULATIONS

- Other conditions for eligibility are generally permissible (meeting certain sales goals, earning certain level of commission, completing a certain number of hours of service (not to exceed 1,200 hours), etc.)
- Former employees who are rehired may be treated as newly eligible for coverage upon rehire and be required to satisfy the waiting period, so long as reasonable under the circumstances
- New Final Rule: Allows up to an additional month for a “reasonable and bona fide” new employment-based orientation period preceding the 90 day waiting period.
 - No definition of “reasonable and bona fide”
 - Period during which the employer and/or employee could evaluate whether employment situation was satisfactory for each party
 - TREAD CAREFULLY!

PLAN DESIGN CHANGES

- All nongrandfathered plans must comply with limits on the total amount participants are required to pay out-of-pocket towards the cost of health benefits
 - Tied to HSA limits (for 2014: \$6,350 for individuals and \$12,700 for families)
- No pre-existing condition exclusions permitted
- No annual limits on “essential health benefits”
 - Essential health benefits include: ambulatory patient services, emergency service, hospitalization, maternity and newborn care, mental health and substance abuse disorder services, prescription drugs, rehabilitative and habilitative services/devises, laboratory services, preventive wellness/chronic disease management, and pediatric services
 - Only nongrandfathered small market plans are required to cover essential health benefits, but if grandfathered and/or large market plans do cover any essential health benefits, they must not impose any annual limits on such benefits

FEES, FEES...AND MORE FEES!

- Patient Centered Outcomes and Research Institute Fee (“PCORI”)
 - Both fully insured and self-funded plans
 - Tax deductible
 - Currently \$2.08 per covered member
 - IRS Form 720 by July 31st of following year
 - Began first plan year on or after 9/20/12 – runs for seven years
- Transitional Reinsurance Program (“TRP”) Fee
 - Both fully-insured and self-funded plans
 - Tax deductible
 - Currently \$63 per covered member (\$44 in 2015)
 - Plan sponsors / issuers report number of covered members to HHS by November 15th and HHS will require payment by January 15th
 - Begins 2014 – runs for three years

FEES, FEES...AND MORE FEES!

- Health Insurance Tax (“HIT”)
 - Fully-insured plans
 - Annual fee assessed on health insurers beginning in 2014
 - The HIT to be collected in 2014 is \$8 billion (increases each year) which is divided among health insurance issuers on a pro rata basis on each issuer’s share of the overall national premium base
 - Indefinite duration

HEALTH/MEDICAL REIMBURSEMENT ACCOUNTS

- Stand-alone HRAs for active employees violate ACA dollar limits and preventive service requirements
- Going forward HRAs must be “integrated” with a group health plan – two permissible methods
- Cannot be used to purchase individual coverage
- Effective for plan years on and after January 1, 2014
- Does not impact retiree-only HRAs

ARE YOU AN “ALE”?

CLARK HILL

ARIZONA | DELAWARE | ILLINOIS | MICHIGAN | NEW JERSEY | PENNSYLVANIA | WASHINGTON, DC | WEST VIRGINIA

WHO IS “ALE”?

- An ALE is an employer that averages 50 or more full-time and/or full-time equivalent employees on business days in the prior calendar year (12 months)
 - NOTE: Special transition rule - solely for purposes of determining ALE status for 2015, an employer may choose to use any 6 consecutive month period in 2014
- **IMPORTANT: ALE status is determined on a controlled group basis! (more on that in a minute)**
- 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 worker exception: If employer was an ALE for less than 120 days in previous calendar year and it was seasonal workers that pushed employer over the 50 full-time employee threshold, employer can exclude seasonal workers

CONTROLLED GROUP RULES

- Determining ALE status (and the applicability of the employer shared responsibility provisions) is determined on an IRS controlled group basis
- Can subject a “small” employer to the employer shared responsibility provisions
- Look to common ownership among companies
- If a controlled group exists, employer shared responsibility analysis and potential penalties apply on an individual employer level (not at the controlled group level)
- Complex rules and analysis

EMPLOYER SHARED RESPONSIBILITY FINAL REGULATIONS

Apply only to ALEs

CLARK HILL

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% [increases to 95% in 2016] of its full-time employees and their dependent children
 - 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 and beyond])

POTENTIAL PENALTIES: “TACK HAMMER”

- “Tack Hammer” penalty applies if:
 - Coverage is offered to at least 70% [95% in 2016 and beyond] 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”
 - 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 [30 in 2016 and beyond] “freebie” employees are prorated among the controlled group members

PENALTY EXAMPLE:

Facts:

- 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
- In 2015, Company A provides affordable, minimum value coverage to at least 70% of its full-time employees (and their children up to age 26)
- In 2015, Company B provides no coverage to its employees
- One of Company B's employees obtains subsidized coverage on the state/federal Marketplace

PENALTY EXAMPLE (CONT'D):

Penalty Analysis:

- 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

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)
 - “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
- Only full-time employees who receive a tax credit or subsidy and who obtain coverage through the Marketplace can trigger a penalty

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

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

WHAT ELSE IS NEW OR HAS CHANGED?

- A new “monthly measurement method” has been added (can be used by employers who do not want to use the look-back method)
- 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 employment is six months or less
- New “part-time” employee definition (i.e., an employee not expected to be full-time and who is neither seasonal nor variable) – treat the same as variable hour employees
- No special provisions for short-term employees who are not seasonal nor for employees in high-turnover positions
- Full-time employees with coverage under an employer’s group health plan may be able to drop coverage during the plan year and obtain coverage through the Marketplace, including where the employee has a reduction in hours (**NOTE:** this will require amendment of an employer’s plan documents)

FINAL REGS: TRANSITIONAL RULES

- Final Regs carry over much of the same transitional relief as under the proposed regulations:
 - 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 shorter measurement period of at least six months and still be permitted to take advantage of a longer (e.g. 12 month) stability (or coverage) period

NEW TRANSITION RULE

- Under the Final Regulations, certain ALEs will not be subject to the employer shared responsibility provisions until 2016 if they meet **all** of the following conditions:
 - The ALE averages between 50 – 99 full-time and/or full-time equivalent employees on business days during 2014
 - 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)
 - 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
- If an ALE does not satisfy the above conditions it must comply with the employer shared responsibility provisions in 2015

NEW TRANSITION RULE (CONT'D)

- 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

IRS REPORTING REQUIREMENTS

Final Regulations

CLARK HILL

SECTION 6056 REPORTING

- ALE to IRS
- Reporting begins for 2015; first report filed in 2016
- Applies to all ALEs (non-ALEs need not report)
- Form 1094-C (recently issued) – report information on each full-time employee and type of coverage offered
 - Filing due to IRS by February 28th (March 31st if filing electronically)
- Form 1095-C (recently issued) – statement to each full-time employee included in IRS report
 - Statement due to employees by January 31st

SECTION 6055 REPORTING

- Minimum essential coverage reporting
- Reporting begins for 2015; first report filed in 2016
- Applies to all insurance issuers and all self-insured plans (regardless of size) (fully-insured plan sponsors need not report, even if an ALE)
- Form 1094-B (recently issued) – report information to IRS regarding minimum essential coverage
 - Filing due to IRS by February 28th (March 31st if filing electronically)
- Form 1094-C (recently issued) – statement to each employee included in IRS report
 - Statement due to employees by January 31st

QUESTIONS & ANSWERS

CLARK HILL

ARIZONA | DELAWARE | ILLINOIS | MICHIGAN | NEW JERSEY | PENNSYLVANIA | WASHINGTON, DC | WEST VIRGINIA

THANK YOU!

**DOUGLAS J. ELLIS
412-394-2367
DELLIS@CLARKHILL.COM**

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.

CLARK HILL

ARIZONA | DELAWARE | ILLINOIS | MICHIGAN | NEW JERSEY | PENNSYLVANIA | WASHINGTON, DC | WEST VIRGINIA