Health Care Reform: A Closer Look

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Topics for Today

- Political / regulatory forecast
- Marketplace Updates
- Marketplace Notices
- 90 Day Waiting Period Rules
- Other Requirements Affecting Employers
- Employer Shared Responsibility Rules (“Pay or Play Rules”)
  - Delay of Pay or Play Rules
- Other Legal Developments Affecting Employers
- Employer Reactions to Pay or Play
- Questions
Americans Unaware ACA is the Law

- 42% of Americans do not know that the ACA is the law, according to Kaiser Family Foundation survey from May 2013
  - 2% think the law was repealed
  - 7% think the law was overturned by the Supreme Court
  - 23% didn’t know/refused to answer

- Administration continues to face many challenges regarding public awareness
Political Forecast

- Legislative divide in power results in gridlock – for 2013 and beyond
  - Minor changes possible – e.g., repeal of CLASS Act in January 2013

- Court challenges ongoing, but short-term impact unlikely
  - Most likely are employer challenges to contraceptive coverage mandate
  - More challenges likely
Regulatory Forecast

- Large number of “open” issues
- Automatic enrollment (likely 2015)
- Nondiscrimination rules
- Coverage for trials
- Employer interaction with Marketplace
- Pay or Play Rules Delayed – Expect more Pay or Play guidance in coming months
- Mental Health Parity Act guidance
- SBC guidance
Overview of Marketplaces

- Marketplace (previously referred to as an “Exchange”) is generally a marketplace for individuals and small employers (later, large employers) to obtain health insurance
  - Theory: “One-stop” shopping that compares data on price, quality and other factors

- Supposed to be created by states
  - If state refuses, federal government can create and manage Marketplace in that state
  - Half the states will run their own Marketplaces or run them in partnership with the federal government

- Affordable Care Act (“ACA”) provides federal subsidies to help pay for health insurance coverage or to reduce certain health plan costs – unclear if subsidies available in federally-controlled Marketplace
Overview of Marketplaces

• Insurance companies will sell “qualified health plans” through the Marketplace
  – Fully-insured plans covering “essential health benefits”
  – Plan level of coverage named by actuarial value (percentage of benefits paid by the plan):
    • Bronze (60% actuarial value)
    • Silver (70% actuarial value)
    • Gold (80% actuarial value), or
    • Platinum (90% actuarial value)
  – Some concerns regarding scope of networks available under Marketplace plans

• Timing for Marketplaces:
  – Open Enrollment begins October 1, 2013
  – Coverage begins January 1, 2014
Overview of Marketplaces

- Small Business Health Options Program ("SHOP") available for small employers
  - Employee choice component: qualified employer selects level of coverage (i.e., bronze, silver, gold, platinum) and all Marketplace plans in that level are available to qualified employees of that employer

- For federally-run Marketplaces, employee choice component of SHOP not required until 2015
  - Small employers using the Marketplace need to choose one plan for employees in 2014, rather than allowing employee choice

- State-run Marketplaces can offer employee choice component
  - Some states still plan to implement employee choice component (e.g., Connecticut, Minnesota) in 2014
DOL recently released Technical Release regarding ACA requirement that employers give employees written notice of Marketplace options

Employers must comply with Marketplace Notice requirements if subject to the Fair Labor Standards Act

- All employees must receive notice, regardless of plan enrollment status or part-time/full-time status

- Employers must provide the notice to any current employee by October 1, 2013, and to any new employee hired after October 1, 2013

DOL provided Model Notices to satisfy Marketplace Notice requirements

DOL also modified Model COBRA Election Notice to include information regarding options available on Marketplaces
DOL Model Marketplace Notices

- ACA requires that Marketplace Notice include:
  - Notice of existence of Marketplaces, including description of services and how to contact Marketplace for assistance
  - Notice that the employee may be eligible for a premium tax credit if employer’s plan does not provide minimum value
  - Notice that employee may lose any employer contribution to the employer’s plan if employee purchases Marketplace coverage

- DOL released model notice for employers that do not offer health plan, and separate model notice for employers that do offer health plan
  - Technical Release: Employers may use models or a modified version of the models, provided notice meets the ACA content requirements
  - Question: Could employer satisfy Marketplace Notice requirements by providing much shorter notice?
  - Question: How does employer complete model for part-time employee?
  - Question: How does employer complete model given delay in Pay or Play Rules?
90-Day Waiting Period Rules

- 90 Day Rule – ACA rule that waiting periods for employees or dependents “otherwise eligible to enroll” cannot exceed 90 calendar days (including holidays and weekends)
- Can impose an hours of service requirement (cannot exceed 1,200 hours) or other substantive eligibility conditions
- Example: Employee begins working 25 hours/week for Company. Company’s plan allows entry for part-time employees when reach 1,200 hours. Employee must come into plan on 91st day after working 1,200 hours.
  - 90-Day Rule applies even if not “full-time” for purposes of Pay or Play Rules
90-Day Waiting Period Rules

- 90-Day Rule generally does not allow employer to delay treatment of employee as “full-time” (beyond Pay or Play Rule)

- 90-Day Rule and Pay or Play Rules attempt to be “integrated” but not perfect
  - E.g., states that no violation of 90-Day Rule if coverage “made effective no later than 13[+] months from employee’s start date.” What if employer uses 6-month measurement period?
  - “Substantive” waiting rule under 90-Day Rule (e.g., obtain license to practice law before enter plan) may violate the Pay or Play Rule
Other Revenue Raisers Affecting Employers

- Cadillac Tax (2018): 40% excise tax on the amount by which the cost of health coverage exceeds $10,200 (single coverage) or $27,500 (family coverage)

- Patient-Centered Outcomes Research Institute Fees: $1 (increases to $2) per participant/dependent
  - Fee paid and reported via Form 720: IRS recently published new Forms 720; check www.irs.gov

- Temporary Reinsurance Fees: app. $63 per health plan participant/dependent

- Additional .9% Medicare Tax: for individuals with annual incomes above $200,000 ($250,000 for families)

- 3.8% Medicare Tax: on “unearned” net investment income
Seven Steps to Understanding Pay or Play

- Understand general Pay or Play Rule concepts
- Is the employer a “large employer”?
- Will any employees receive federally-subsidized Marketplace coverage?
- Does the employer offer minimum essential coverage under an employer plan?
- Does the plan provide minimum value?
- Is the plan’s coverage affordable and offered to all full-time employees?
- If applicable, calculate and pay the penalty
Step 1: Understand General Rules

- **Today:** Employer can refuse to offer coverage without any federal penalty

- **January 1, 2015:** Employers are not required to provide health insurance to employees, but tax applies if full-time employee receives federally-subsidized Marketplace coverage
  - No exclusion for governmental, church or non-profit employers
  - January 2013 proposed regulation provides various transition rules – not clear if these will be retained in final regulation
  - Employers generally must measure in 2014 (or starting late 2013) to know who is full-time as of January 1, 2015
Employer Shared Responsibility Rules Delayed

- Employer shared responsibility requirements delayed until 2015
  - On July 2, 2013, Obama administration announced delay of employer shared responsibility rules (known as the “Pay or Play Rules”) and certain reporting requirements for employers
  - IRS will not assess penalties under Pay or Play Rules in 2014
  - Delay does not directly impact any other ACA requirements or fees (including individual shared responsibility rules and Marketplaces)
    - House passed measure to also delay individual shared responsibility rules
    - Senate not expected to pass measure
    - Obama expected to veto measure if proceeds that far
Employer Shared Responsibility Rules Delayed

- IRS intends to issue guidance this summer regarding reporting requirements
- IRS guidance encourages voluntary compliance in 2014 to allow smooth transition into 2015
- Employers should review options and evaluate what steps they need to take to prepare for 2015
  - May need to start tracking employee hours in October 2013
  - Not clear if transition rules in proposed regulations will apply for 2015
Step 1: Effective Date

- Proposed regulations contained confusing guidance for when non-calendar year plans must comply
  - Two pieces of relief – originally thought either or both can assist
  - Not clear if final regulations will retain relief

- If relief not obtained, administrative complexity
  - E.g., 12-month policy from 2/1/2014 – 1/31/2015 likely would not have eligibility terms which track Pay or Play Rule
Step 1: Dependent Coverage

- Tax depends on whether “minimum essential coverage” was offered to full-time employees “(and their dependents)”
  - Dependents do not include spouses (so spousal carve-out ok for Pay or Play Rule purposes)
  - Must offer coverage to children (defined in Code Section 152(f)(1))
  - Proposed Regulation Transition Relief: Employer ok if “takes steps” in 2014 to offer children coverage (but cover by 2015)
    - Not clear if relief will be retained in final regulations
  - Unclear if any penalty is possible when employer offers affordable, minimum value, minimum essential coverage to employees but not children
Possible Penalties

- **No Offer Penalty:** If employer does not offer minimum essential coverage:
  - $2,000 (annual, but calculated on monthly basis) tax per full-time employee, if at least one full-time employee obtains federally-subsidized Marketplace coverage
  - Calculated after first 30 employees; 5% de minimis

- **Unaffordable Coverage Penalty:** If employer does offer minimum essential coverage but at least one full-time employee obtains federally-subsidized Marketplace coverage:
  - Tax is lesser of $3,000 per subsidized full-time employee, or $2,000 per all full-time employees (annual, but calculated on monthly basis)
Step 2: Is the Employer a Large Employer?

- Check if employer has at least 50 full-time (including full-time equivalent (FTE)) employees during preceding calendar year
  - Proposed regulation includes 6-month transitional rule for 2013
- Includes common law employees, FTE part-time, FTE seasonal, controlled group
- IRS guidance defines “employee” as: “a worker who is an employee under the common-law test” (apparently excludes independent contractors)
- For purposes of determining whether the rule applies, a “full-time” employee is an individual working 30+ hours per week
  - IRS: 130 hours of service in a calendar month = 30 hours of service per week
Step 2: Is the Employer a Large Employer?

- “Hours of service” include:
  - Hour for which employee is paid, or entitled to payment, for the performance of duties for the employer; and
  - Hour for which employee is paid, or entitled to payment by the employer on account of a period of time during which no duties are performed due to vacation, holiday, illness, incapacity (including disability), layoff, jury duty, military duty or leave of absence

- “Hours” calculated on actual hours of service for hourly employees
  - Equivalency or actual hours method allowed for non-hourly employees
  - Generally can use different methods for different non-hourly employee classifications (and also change methods)
Step 2: Is the Employer a Large Employer?

- Special rules apply for counting full-time employees (controlled group, predecessor and new employers)
- Controlled group rules similar to those for retirement plan purposes (use Code Section 414 definition)
  - So, 100% owner usually cannot divide a 200-employee company into five 40-employee companies to avoid the Pay or Play Rule
  - Penalty *not* applied on controlled group basis
- Other “anti-abuse” rules also apply
  - E.g., XYZ Co. and Staffing Co. “divide” employee so employee works 20 hours / week for each
Step 2: Is the Employer a Large Employer?

- Determine number of FTE part-time employees

- FTE rule for part-time employees:
  - Only for purposes of determining if Pay or Play Rule applies – do not have to offer coverage to part-time employees
  - First, calculate aggregate number of hours of service (not more than 120 hours) for all non-full-time employees for a month
  - Second, divide total hours of service by 120
    - Result is FTEs for calendar month. Do not drop fractional amounts
  - Add each month’s numbers to arrive at yearly total
  - Divide yearly total by 12, then disregard fractions
    - Result is number of full-time and FTE employees. If result is 50 or more, employer is subject to Pay or Play Rule
Illustration of Calculating Number of FTE Employees. Country Club Inc. has 40 full-time employees from January through December 2015. Country Club Inc. also has 30 additional employees who assist during the busiest time of the year, a five-month period from May through September. Ten of the 30 employees work 100 hours per month during those five months, while twenty of the 30 employees work 125 hours per month. How many FTEs does Country Club Inc. have? Is Country Club Inc. subject to the Pay or Play Rule?

Country Club Inc. would calculate its FTEs as follows:

1. **Aggregate Hours.** The aggregate hours for each of the five months will equal: \[(10 \text{ employees} \times 100) + (20 \text{ employees} \times 120)\] = 1,000 + 2,400 = 3,400 aggregate hours per month. Note that the maximum number of hours considered is 120, even though twenty of the employees actually worked more (here, 125 hours). The extra five hours (125 - 120) are ignored.

2. **Divide by 120.** Divide the aggregate hours (3,400) by 120. The result is 28.33, which is the FTE number for each month.

3. **Add Full-Time Employees.** Now add to the FTE number (28.33) the number of full-time employees for that month (here, 40). For May through September, Country Club Inc. has 68.33 employees who are counted (full-time plus FTE).
Calculating Number of FTEs

(4) **Add Each Month.** Now add up the numbers for each month.

<table>
<thead>
<tr>
<th>Month</th>
<th>Total Counted Employees (Full-Time + FTE)</th>
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</thead>
<tbody>
<tr>
<td>January</td>
<td>40</td>
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<tr>
<td>February</td>
<td>40</td>
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<td>March</td>
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<td>April</td>
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<td>May</td>
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<td>June</td>
<td>68.33</td>
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<td>July</td>
<td>68.33</td>
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<td>August</td>
<td>68.33</td>
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<tr>
<td>September</td>
<td>68.33</td>
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<tr>
<td>October</td>
<td>40</td>
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<tr>
<td>November</td>
<td>40</td>
</tr>
<tr>
<td>December</td>
<td>40</td>
</tr>
<tr>
<td><strong>Total for Year</strong></td>
<td><strong>621.65</strong></td>
</tr>
</tbody>
</table>

(5) **Divide by 12.** Now divide the yearly total by 12. $621.65 / 12 = 51.80$. The fraction (.80) is disregarded. Country Club Inc. has 51 counted employees (full-time plus FTE). Country Club Inc. is subject to the Pay or Play Rule because it has at least 50 counted employees.
Seasonal Employee Special Rule

- If employer’s workforce exceeds 50 full-time employees for 120 days or fewer during a calendar year; AND

- Employees in excess of 50 who were employed during that period of no more than 120 days were “seasonal employees”, employer would NOT be subject to Pay or Play Rule
  - “Seasonal” defined at 29 C.F.R. Section 500.20(s)(1)
  - Notice 2012-58 and 1/2/2013 Regs: No set definition yet
    - “Reasonable, good faith interpretation” ok – e.g., ski instructor working for 5 months
    - Arguably, could be “seasonal” even if employed year-round
Illustration of Calculating Number of FTE Employees. Country Club Inc.'s neighbor is Yacht Club Inc. Yacht Club Inc. has 40 full-time employees from January through December 2015. Yacht Club Inc. has 50 (not 30, as Country Club Inc. does) additional employees who assist during the busiest time of the year, a four-month period from May through August. Twenty of the 50 employees work 100 hours per month during those four months, while thirty of the 50 employees work 125 hours per month. All the workers are "seasonal" workers. How many FTEs does Yacht Club Inc. have? Is Yacht Club Inc. subject to the Pay or Play Rule?

Yacht Club Inc. would calculate its FTEs as follows:

1. **Aggregate Hours.** The aggregate hours for each of the four months will equal: 
   \[(20 \text{ employees} \times 100) + (30 \text{ employees} \times 120)] = 2,000 + 3,600 = 5,600 \text{ aggregate hours per month.} \]

   Note that the maximum number of hours considered is 120, even though thirty of the employees actually worked more (here, 125 hours). The extra five hours (125 - 120) are ignored.

2. **Divide by 120.** Divide the aggregate hours (5,600) by 120. The result is 46.66.

3. **Add Full-Time Employees.** Now add to the FTE number (46.66) the number of full-time employees for that month (here, 40). For May through August, Yacht Club Inc. has 86.66 employees who are counted (full-time plus FTE).
(4) **Add Each Month.** Now add up the numbers for each month.

<table>
<thead>
<tr>
<th>Month</th>
<th>Total Counted Employees (Full-Time + FTE)</th>
</tr>
</thead>
<tbody>
<tr>
<td>January</td>
<td>40</td>
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<td>April</td>
<td>40</td>
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<td>May</td>
<td>86.66</td>
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<td>June</td>
<td>86.66</td>
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<td>July</td>
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<td>August</td>
<td>86.66</td>
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<tr>
<td>September</td>
<td>40</td>
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<td>October</td>
<td>40</td>
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<tr>
<td>November</td>
<td>40</td>
</tr>
<tr>
<td>December</td>
<td>40</td>
</tr>
<tr>
<td><strong>Total for Year</strong></td>
<td><strong>666.64</strong></td>
</tr>
</tbody>
</table>

(5) **Divide by 12.** Now divide the yearly total by 12. 666.64 / 12 = 55.55. The fraction (.55) is disregarded. Yacht Club Inc. has 55 counted employees (full-time plus FTE). This is above the typical 50-employee limit. However, we need to add an additional step -- Step 6, below -- to determine if Yacht Club Inc. satisfies the seasonal employee exception noted above.
(6) **Examine Seasonal Employee Exception.** The seasonal employee exception is limited to employees who were employed for a maximum of a 120-day period. On the previous slide, the time period (May - August) technically exceeds 120 days (it equals 122 days). IRS guidance, however, provides that the extra two days are ignored, since there are only four calendar months involved. Thus, the "120-day" standard is satisfied.

- On the previous slide, all the employees in excess of 50 are seasonal employees. (Remember, Yacht Club Inc. only has 40 year-round, full-time employees.) Thus, all the criteria for the seasonal employee exception are satisfied. Yacht Club Inc. is not subject to the Pay or Play Rule in 2016, even though it has 55 counted employees (full-time plus FTE) in 2015.
Step 3: Will Employees Receive Subsidized Marketplace Coverage?

- ACA provides federal subsidies to help pay for health insurance coverage or to reduce certain health plan costs on the Marketplaces.
- As discussed, Marketplace is generally a marketplace for individuals and small employers (later, large employers) to obtain health insurance.
Step 3: Will Employees Receive Subsidized Marketplace Coverage?

- Always possible for an employer (with help from insurer / TPA) to design health plan so employer never faces Pay or Play Rule penalty
  - But may require plan design changes and employer must follow three requirements
  - (a) Offer “Minimum Essential Coverage” under an “eligible employer-sponsored plan” to all its full-time employees (and, perhaps, dependents) who are eligible for subsidized Marketplace coverage
  - (b) Ensure employer’s plan provides “Minimum Value”
  - (c) Ensure employee’s share of premium for self-only coverage for employer’s lowest-cost, Minimum Value plan is “Affordable”

- Steps 4 – 6 discuss each point
Step 4: Offer Minimum Essential Coverage?

- New regulation (2/1/2013) includes:
  - Employer sponsored coverage
  - Grandfathered health plan offered in group market
  - Other plan in state’s small or large “group market”
  - Note: Is there a limit on how “low” plan could go?

- Minimum essential coverage also includes:
  - Coverage purchased in individual market
  - Medicare Part A, Medicare Advantage, and most Medicaid
  - Certain other types of governmental plan

- Does not include excepted benefits (health FSA, many dental and vision plans)

- Can apply to HHS for “recognition” of MEC status
  - Not available for employer-sponsored plans
Step 4: Offer Minimum Essential Coverage?

- What does it mean for employer to “offer” coverage?
  - IRS regulation: Must have opportunity to enroll (or not enroll) once per year
    - Cannot force employee into non-minimum value, unaffordable plan
  - Doubtful that one employer (e.g., professional employer organization or “PEO”) can offer on behalf of another (e.g., PEO’s client)
    - But, would that offer make person ineligible for Marketplace subsidy? New draft applications released but do not provide answer
  - Cash in Lieu of Benefits: Golf Course Inc. hires Noah the Golf Pro on 1/1/2014. Noah will be full-time and has health plan coverage through spouse. Noah agrees to permanently waive health plan coverage (to extent legally possible) in Marketplace for higher wages. Golf Course Inc. does not offer Noah coverage in 2015. Will Golf Course Inc. face a Pay or Play Rule penalty?
Step 4: Offer Minimum Essential Coverage?

- Possible to offer a “skinny plan” to employees and satisfy minimum essential coverage step?
  - Offer preventive care and little, if any, other coverage
  - Not subject to “No Offer Penalty” if employer offering minimum essential coverage
  - Could be subject to “Unaffordable Coverage Penalty” because “skinny plan” would not provide minimum value
    - But would avoid Unaffordable Coverage Penalty for each employee who elects “skinny plan” coverage
  - Likely short term strategy
Step 4: Offer Minimum Essential Coverage?

Possible to offer a plan with restricted provider networks and satisfy minimum essential coverage step?

- Plan would include very limited network of providers for “in-network” coverage (e.g., one hospital, one doctor, only providers in another city/state)
- Some plans offered on Marketplaces use a similar approach for reducing costs
- Likely treated as minimum essential coverage
- Employer could avoid Pay or Play Penalties if the plan is affordable and provides minimum value
- Potential employee morale issues based lack of employee choice and possible travel time to receive “in-network” coverage
Step 5: Does Plan Provide Minimum Value?

- “Minimum value” definition under ACA: “plan’s share of the total allowed cost of benefits provided under the plan is less than 60 percent of such costs”
- IRS will examine typical benefits provided by other employers and use that as standard
- IRS and HHS have discussed “calculators” and “checklists” to simplify determination
  - Can use now to verify satisfy test
  - May 3 regulation clarifies whether wellness discounts for deductibles and other cost-sharing are considered
    - Yes, if discount is tobacco-related
  - Previously, IRS indicated that 98% of employees in US covered by plan that was expected to pass this test
Step 6: Is Plan Coverage Affordable?

- Employee can obtain subsidized Marketplace coverage if income at least 100% of federal poverty level ("FPL") and not more than 400% FPL (about $92,000 today for a family of four) and either:
  - Poor Plan (No "Minimum Value"): Plan pays less than 60% of total benefits allowed under plan; or
  - Costs Too Much: Employee’s share of premium for employee portion of “self-only” coverage for employer’s lowest-cost coverage that provides minimum value > 9.5% of employee’s “household income”

- “Household income” = modified adjusted gross income of employee and members of employee’s family who are required to file income tax return
  - Various adjustments (e.g., tax-exempt interest)
  - Employers would not typically know household income

- IRS: Employers allowed to use W-2 wages or two other “safe harbors”
Step 6: Is Plan Coverage Affordable?

- Coverage is affordable if employee contribution for self-only coverage for lowest cost option offered by the employer does not exceed 9.5%:
  - Of the employee’s Box 1 W-2 wages for that calendar year (for annual employee contributions)
  - Of the Federal poverty level for a single individual (for monthly employee contribution)
    - For 2013, 9.5% = $90.96 per month
  - Of the employee’s monthly wages (for monthly employee contribution)
    - For hourly workers, multiply hourly rate by 130 hours (this safe harbor ignores hours worked in excess of 130)
Step 6: Is Plan Coverage Affordable?

- Individuals can still use true “household income” for Marketplace subsidy purposes
  - Some employees receive subsidized Marketplace coverage but no Pay or Play Rule penalty for employer

- What if employer gets “lucky” and full-time employee falls into prior categories but does not receive Federally-subsidized Marketplace coverage?
  - Employee covered through spouse
  - Employee decides to “protest” law
  - No employer penalty
  - Again, key is what employer can control – the “offer” of coverage
Wellness Programs, Affordability and Minimum Value

- General rule: When determining affordability and minimum value, employer must assume that the employee will fail to satisfy the requirements of a nondiscriminatory wellness program.

- Exception for Programs Related to Tobacco Use: Employers can calculate affordability and minimum value by assuming every eligible individual satisfies the terms of a nondiscriminatory wellness program related to tobacco use.
  - For affordability, take incentive into account if results in premium reduction.
  - For minimum value test, take incentive into account if results in reduced cost-sharing.
Step 7: Determine “Full-Time” Employees and Calculate the Penalty

- Must employer determine who is a “full-time” employee?
  - Theoretically “no” – but employer would need to promptly offer coverage to all employees
  - Could determine on month-by-month basis (but administratively difficult)

- Who is a “full-time” employee?
  - Complicated proposed regulations
    - Does provide helpful clarifications and certainties
    - Can rely on through 12/31/2014
Step 7: Determine Who is a “Full-Time” Employee?

- Generally divide employees into different categories
  - Ongoing Employee
  - New Employees
  - New, Full-Time Employee
  - New, Variable Hour Employee
  - New, Seasonal Employee
  - Part-Time Employees
    - Term not used in Pay or Play Rule guidance, but is used in March 18, 2013 90-day waiting period regulation
  - Transitional Employee (our term, not an IRS term)
Step 7: Ongoing Employees

- Employer selects Standard Measurement Period
  - 3-12 month period in which employer will determine whether employee has worked on average 30 hours per week
  - Employer chooses when it starts and ends

- If Ongoing Employee is a full-time employee, he is “protected” and remains full-time employee during subsequent Stability Period
  - Stability Period must be at least 6 consecutive calendar months
    - Leads to awkward results if 3-month Measurement Period selected
  - Stability Period generally cannot be shorter than Standard Measurement Period

- Start of Stability Period can be delayed for up-to-90-day Administrative Period
  - Allows employer to calculate employee’s hours, answer questions from employees, collect materials from employee, etc.
Step 7: Ongoing Employees

Illustration of Full-Time Employee Time Periods

In this example, assume Employer uses a 12-Month, October 15-based Standard Measurement Period. Employer also uses a 12-Month Stability Period and 2½ month Administrative Period. Assume Employer hired Alex the Employee as a full-time employee in 2007 and Alex has worked continuously since then as a full-time employee of Employer.

1/1/2014 to 10/15/2014

1/1/2015 to 10/14/2015

1/1/2016 to 12/31/2016

- Standard Measurement Period – Alex’s hours during this time are measured
- Administrative Period – Employer checks to see if Alex is still full-time. If so, Employer offers coverage to Alex
- Stability Period – If Alex enrolls for coverage, Alex continues to be covered during this time
Step 7: Ongoing Employees

- Can use different Measurement and Stability Periods for employee classes:
  - Collectively bargained
  - Salaried and hourly
  - Different entities
  - Different states

- Consider whether mandatory subject of bargaining (for union employees)

- Consider administrative impact

- Unclear if choices must be “documented”
  - If will “sync up” with eligibility, ERISA may require
  - May want to document for IRS purposes
    - New reporting rule under Code Sections 6055 and 6056
    - Will require reporting of who is “full-time” employee
    - Will that definition “sync up” with Pay or Play Rule?
Step 7: New Employees Expected to be Full-Time

- Employer makes “snapshot” determination as of “start date” that employee is “reasonably expected” to work full-time
  - What if expectation changes on day 2? Unclear (for this category of employee)
  - Is “start date” date the person first shows up for work? Date of hire? What if person is delayed in starting and expectation changes?

- Appears phrase “to work full-time” means “to work full-time indefinitely”
  - E.g., Big Ski Hill hires Stacie as instructor for season (11/15/2015 – 3/15/2016). Stacie will work 60 hours per week during that period but 0 rest of year. IRS example treats Stacie as a Seasonal Employee, not a New, Full-Time Employee
Step 7: New Employees Expected to be Full-Time

- No Pay or Play Rule penalty if employer offers health plan coverage at or before conclusion of employee’s initial three full calendar months of employment.

- E.g., Goodco hires Frank on 6/15/2015. Is first month of June “ignored” because it is not a “full” month? Or does period from 6/15 – 7/14 count as first “full” month?
  - If June is ignored, Frank enrolls by October 1.
  - If June “counts”, Frank presumably enrolls by September 14. Would employers “round down” to September 1?
  - Better answer seems to be enroll by October 1.

- Note no “measurement period” / “stability period” for class.
  - Are such employees “protected” in event of status change?
  - E.g., Frank has personal need to work part-time beginning November 2015. Is Frank “locked in” to full-time status? If so, for how long?
Step 7: New, Variable Hour Employee

- Usually Variable Hour and Seasonal Employees treated the same

- Technically, Variable Hour Employee involves New Employee with uncertain future hours (not known if will average 30 hours/week)
  - Employment status change requires health plan coverage by 1st day of 4th month after change
  - Employer must assume that although employee’s hours of service may vary, employee will continue to be employed for entire “Initial” Measurement Period

- Employer measures full-time status using “Initial” Measurement Period (not a “Standard” Measurement Period)
  - Also a period between 3 – 12 months
  - Employers may want shorter period (e.g., 11 months) due to special rule (discussed later)
Step 7: New, Variable Hour Employee

- Stability Period for Variable Hour Employees must be same length as Stability Period for Ongoing Employees
  - So, are “linked” somewhat

- If Variable Hour Employee treated as full-time, Stability Period must:
  - Be at least six consecutive calendar months
  - Be no shorter in duration than the Initial Measurement Period
  - Begin after the Initial Measurement Period (and any associated Administrative Period)
Step 7: New, Variable Hour Employee

Illustration of New, Variable Hour Employee (No Administrative Period) *

For New Employees, the Employer uses an initial Measurement Period which begins on the first day of employment and ends 12 months later. Employer also uses a 12-Month Stability Period and no Administrative Period. Assume Employer hired Betty the Employee as a Variable Hour Employee on April 10, 2015.

1/1/2015 4/10/2015 12/31/2015

4/9/2016

1/1/2015 4/10/2016 12/31/2015

1/1/2017 4/9/2017 12/31/2017

Betty’s Initial Measurement Period – Employer checks to see if Betty is full-time

Betty’s Stability Period – If Betty enrolls for coverage effective 4/10/2016, Betty is covered during this time, until her Stability Period ends after 12 months (here, 4/9/2017)

*Slide illustrates look-back method rules under proposed regulations without delay of Pay or Play Rules. To consider delay, assume Employer hired Betty on April 10, 2015.
Step 7: New, Variable Hour Employee

- For Variable Hour Employee, employer can “split” Administrative Period

- Helpful to make dates “easier” (e.g., start counting as of first of month)

- However, special rule: combined Initial Measurement Period and Administrative Period may not extend beyond last day of first calendar month beginning on or after one-year anniversary of employee’s start date
  - Totals, at most, 13 months and a fraction of a month
  - Prevents employer from having 12-month Measurement Period and 90-day Administrative Period
Step 7: New, Variable Hour Employee

Illustration of New, Variable Hour Employee (Impermissible 90-Day Administrative Period, 12-Month Measurement Period) *

For New Employees, Employer uses an Initial Measurement Period which begins on the first day of employment and ends 12 months later. Employer also uses a 12-Month Stability Period and a 90-day Administrative Period. Assume Employer hired Rick the Employee as a Variable Hour Employee on April 10, 2015.

*Slide illustrates look-back method rules under proposed regulations without delay of Pay or Play Rules. To consider delay, assume Employer hired Rick on April 10, 2015.
Step 7: New, Variable Hour Employee

Acceptable Split Administrative Period (11-Month Measurement Period)

1st Administrative Period

1/1/2015 5/10/2015 6/1/2015 12/31/2015

2nd Administrative Period

1/1/2016 4/30/2016 7/1/2016 12/31/2016

Employee’s Initial Measurement Period

Administrative Period

Stability Period
Step 7: New, Variable Hour Employee

- If Variable Hour Employee not treated as full-time during Initial Measurement Period, employer can treat employee as not “full-time” for a “Limited” Stability Period

- Limited Stability Period:
  - Must not be longer than one month longer than the Initial Measurement Period
  - Must not exceed remainder of Standard Measurement Period (and any associated Administrative Period) in which Initial Measurement Period ends
  - Appears to be designed to allow employee to “re-qualify” quickly for full-time status
Step 7: New, Variable Hour Employee

Illustration of New, Variable Hour Employee (Limited Stability Period)

In this example, assume Employer uses a 12-Month, October 15-based Standard Measurement Period for Ongoing Employees. For New Employees, the Initial Measurement Period begins on the first day of employment and ends 12 months later. An Administrative Period is used for these New, Variable Hour Employees, where the Period runs until the end of the month after the Initial Measurement Period ends. For Ongoing Employees, Employer uses a 12-Month Stability Period which begins on January 1 and a 2½ - month Administrative Period. Assume Employer hired Carol the Employee as a Variable Hour Employee on May 10, 2016. Assume Carol only averages 28 hours during the Initial Measurement Period of May 10, 2016 – May 9, 2017, but 30.0 hours during the 10/15/2016 – 10/14/2017 Standard Measurement Period.

Thus, the net effect is that:
- Carol is not offered coverage from the start date (May 10, 2016) through all of 2017
- Because Carol was not deemed full-time during her unique Initial Measurement Period, Carol receives another chance to qualify for full-time status. Employer must count the hours Carol worked from October 15, 2016 – October 14, 2017 [the Standard Measurement Period which applies to Ongoing Employees – even though Carol is not an Ongoing Employee as of the start of that Standard Measurement Period].
- Although Employer may want to “lock in” Carol as a Part-Time Employee who is not eligible for plan coverage from July 1, 2017 – June 30, 2018 (the typical 12 months) Employer cannot do this. Carol’s average of 30 hours during the overlapping Standard Measurement Period of October 15, 2016 – October 14, 2017 “controls.” Carol becomes a Full-Time Employee on January 1, 2018 and receives plan coverage.
Step 7: Seasonal Employees

- Under prior IRS guidance, appeared Seasonal Employees could never be deemed “full-time” (even if working 30+ hours)

- Now, key seems to be length of Initial Measurement Period (and Administrative Period) selected by employer
  - Long periods will prevent Seasonal Employees from being “full-time”

- E.g., Little Ski Hill has a 3-month Initial Measurement Period from 11/15/2015 – 2/14/2016. Administrative Period lasts until first of month following end of Initial Measurement Period.
  - Little Ski Hill hires Ted on 11/15, who works 60 hours per week entire time
  - Ted’s Initial Measurement Period ends 2/14/2016
  - Ted’s Administrative Period ends 2/28/2016
  - Ted seems to be “full-time” as of 3/1/2015 (before he terminates employment on 3/15)
Step 7: Rehired Employees

- What if employee has a period of no service then returns to service?
  - If break was “long enough” prior hours ignored and employee is a “New” employee
    - 26 weeks
    - If less than 26 weeks, apply rule of parity (at least 4 week break; compare break period to prior work period)

- Special rules for counting hours if break due to unpaid FMLA leave, USERRA leave or jury duty
- If special rule applies, ignore weeks with zero hours or provide “credited” hours
Step 7: Part-Time Employees

- Term “part-time” employee not used or defined in Pay or Play Rule guidance
  - Appears to be a “gap” in guidance
  - 90-day waiting period rules discuss “part-time” employees
  - Suggests that employer should track Part-Time Employee hours as do Variable Hour Employees
    - Makes sense – otherwise, such employees never measured (and can never become full-time, even if actually working full-time)
  - So, likely should “measure” their hours
Step 7: Transitional Employees

- Once New Employee employed for a Standard Measurement Period, becomes Ongoing Employee
- Employer then tests employee using same rules as other Ongoing Employees
- Full-time Ongoing Employee can lose “full-time” status, but effect is delayed
  - Ongoing Employees not affected by “employment status change” – they are “locked in” for Stability Period
Examples of Penalties (Seasonal)

- Green Co. has 1,000 year-round, full-time employees. During busy summer months it hires 200 seasonal, full-time and 100 seasonal, part-time employees. Green Co. offers good health plan to year-round workers but none to seasonal employees. Will Green Co. face a penalty?

- Assume health plan structured to avoid “pay or play” penalty
  - No penalty for year-round, full-time employees
  - No penalty for seasonal, part-time employees

- Penalty now possible for seasonal, full-time employees

- Green Co. should consider longer Initial Measurement Period / Administrative Period

- But, Green Co. should be cautious with rehired employees
Examples of Penalties (Pay AND Play)

- Generous Co. has 1,000 full-time employees. Generous Co. offers excellent health plan to 940 employees. However, a group of 60 employees in remote locations have never received coverage. All employees are full-time. Could Generous Co. face a penalty? If so, how much?

- Penalty is possible. 5% de minimis rule likely does not apply

- 60 full-time employees may be eligible for Marketplace subsidy
  - Could be some exceptions (e.g., all 60 may have been recently hired and in 3-month “free look” for New, Full-Time Employees; all 60 may be above 400% of poverty level)

- If penalty applies, Generous Co.’s annual penalty would be:
  - \(((1,000 - 30) = 970) \times 2,000 = 1,940,000\)
  - Large penalty considering Generous Co. is providing rich health plan coverage to 94% of workforce
  - Worst of all worlds for employer – want to avoid this through plan design (or hope to be lucky!)
Practical Considerations

- Effective date has caused confusion
  - (Rules delayed until January 2015)
  - Employers with calendar-year plans need to establish relevant periods (e.g., Standard Measurement Period) and begin measuring
  - As noted previously, complicated transition rules for non-calendar year plans under proposed regulations
  - Proposed regulations include special transition rule allows employer to use 6-month Measurement Period in 2013, but keep 12-month Stability Period in 2014
    - Unclear if transition rule will be available under final regulations
  - Employer may need to start Measurement Period in 2013 if no transition rule
    - Employers with high summer seasonal workforce usually want 12-month (not 6-month) Transitional Measurement Period
Practical Considerations

- Will almost certainly require insurers / TPAs / employers to make some plan changes
  - E.g., if employer sets eligibility using “expected to work 30+ hours per week”, have Pay or Play Rule risk
  - Thus, many employers may choose to “sync up” eligibility provisions with Pay or Play Rule
    - Not legally required, but only way to “guarantee” no Pay or Play Rule risk
    - Perhaps could rely on 5% de minimis exception
  - Even employers with “generous” eligibility provisions may have risk
    - E.g., Acme Co. allows employees into plan if “scheduled” to work 20 hours per week (prospective standard)
    - Standard would not catch those who work, e.g., 15 hours currently but who are “full-time” due to prior high hours
    - Acme also may not take into account unpaid leave (e.g., FMLA, USERRA, jury duty) in way provided by Pay or Play Rule
  - Also, new COBRA-like rules for late / short payments
COBRA may be affected

- E.g., Ongoing Employee’s reduction in hours in January 2015 may cause loss of coverage and offer of COBRA in February 2015
  - But, may be “Super COBRA” – e.g., no ability to terminate due to other coverage or, perhaps, for cause
  - Could require changes to COBRA forms, policies and procedures and training
  - Note: Regulations clarify that 9.5% W-2 safe harbor not violated by charging more for COBRA
    - But what about Rate of Pay Safe Harbor and Federal Poverty Line Safe Harbor?
- May 3 regulation notes that active employees may be eligible for COBRA due to reduced hours
  - Those employees “should be subject to the same rules for eligibility of affordable employer-sponsored coverage offering [minimum value] as other active employees”
  - Does this require greater employer contributions?
Practical Considerations

- For employer with calendar year plan, “easiest” solution is to have:
  - 12-month Measurement Period from, e.g., October 15, 2013 – October 14, 2014
  - 2.5-month Administrative Period from October 15, 2014 – December 31, 2014
  - 12-month Stability Period from January 1, 2015 – December 31, 2015

- Not clear if transition rules will apply in 2014 to allow use of shorter measurement period in 2014

- Include all employees employed as of October, 15, 2013?
  - What about employees hired after that date?
**Employer Strategic Considerations**

- **Soft Factors (e.g., loss of control over employee health; morale)**
  - Comparison to competitors
  - Risk of increased penalties
  - Focus on removing “high risk” employees?

- **Hard factors**
  - Start with $2,000 / $3,000 penalties
  - Extra compensation to pay employees?
  - Tax impact (savings from employer-sponsored system)
Employer Strategic Considerations

- Employers were considering what type of health plan, if any, to offer to employees beginning in 2014 – can now defer decision for short time
  - Strategies aimed at avoiding only the No Offer Penalty, or at avoiding both Pay or Play Penalties

- Potential Employer Strategies:
  - Offer “affordable” “minimum essential coverage” that offers “minimum value” to at least 95% of full-time employees, thereby avoiding all fees
    - Pros: Could be cost-effective if company already offers affordable coverage to a significantly large group of full-time employees
    - Cons: Could be costly if it requires expanding coverage to a large group of employees; could require reductions to employee’s contribution levels; could require significant additional recordkeeping
Employer Strategic Considerations

- Potential Employer Strategies (cont.)
  - Abandon health plan and send all employees to Marketplaces
    - Pay the “No Offer Penalty” under the Pay or Play Rules
    - Potential attraction, retention, and other employee morale issues
    - Loss of tax-advantaged health plan
  - Do nothing and pay any applicable fee
    - Pros: Requires few administrative or plan changes; fee could be small if employer has around 30 full-time employees or has high coverage levels already;
    - Cons: Could result in significant fees
Potential Employer Strategies (cont.)

– Offer “unaffordable” and/or non-minimum value coverage and pay the Unaffordable Coverage Fee
  ▪ Pros: Avoids No Offer Fee; could result in fewer employees accepting coverage and thus result in a lower cost of providing coverage
  ▪ Cons: If significant numbers of full-time employees obtain subsidized Marketplace coverage, Unaffordable Coverage Fee could be significant

– Reduce numbers of full-time employees
  ▪ Pros: Limits exposure to No Offer and Unaffordable Coverage Fee
  ▪ Cons: Poses discrimination litigation threat under ERISA, ACA whistleblower rules, Internal Revenue Code or other applicable employment laws; could require changes to business operations to shift to a more part-time workforce; employee turnover
Employer Shared Responsibility

- Common scenario: company offers a reasonable health insurance plan to most of its employees, and pays 75% of the premium cost (employee pays remaining 25%)

- If one of the company’s full-time employees purchases subsidized coverage on the Marketplace, what could happen?
  - Company could pay No Offer Fee if company leaves out too many “full-time” employees
  - Company could pay Unaffordable Coverage Fee if coverage is “unaffordable” (more than 9.5% of W-2 wages or other safe harbor)
  - If company offered employee affordable coverage, the company could appeal the Marketplace’s decision

- We recommend that that the company assesses its financial risk and develop a strategy to reduce the risk
Other Legal Developments Affecting Employers

- Final HIPAA Wellness Plan Regulations issued on June 3, 2013
  - May require changes to wellness plan structure

- On June 26, 2013, Supreme Court found Section 3 of Defense of Marriage Act unconstitutional
  - May require changes to employers’ health and retirement plans
Questions?

Thank you for attending!

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