



What Every Employer Should Know About the Affordable Care Act



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Background

Key Provisions of the ACA Affecting Employers

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- Background
- Key provisions of the ACA affecting employers
 - Individual responsibility requirement
 - Employer shared responsibility requirement
 - Exchanges
 - Automatic enrollment requirement
 - Private insurance reforms
 - Grandfathered Plans
 - Summary of Benefits and Coverage (SBC) requirement
- Q&A

■ U.S. Supreme Court

- In March, the Supreme Court heard over six hours of argument in litigation over the ACA
- The four main questions addressed were:
 - Do the federal courts have **jurisdiction** to hear the challenge at all?
 - Is the **individual mandate constitutional**?
 - If so, can the mandate be **severed** from the remainder of the law?
 - Is the **Medicaid expansion constitutional**, or is it coercion of state decision-making, inconsistent with the Tenth Amendment and principles of federalism?
- On June 28, in a 5-4 decision, the Supreme Court issued its opinion:
 - Yes, the federal courts **have jurisdiction** to hear the challenge to the ACA today;
 - Yes, the individual mandate is **constitutional**;
 - As a result, the court **need not address** the issue of severability; and
 - The Medicaid expansion is **not constitutional, but only because of the way that it is enforced.**

■ Effect of the elections

Key Provisions of the ACA Affecting Employers

Individual Responsibility Requirement

- The requirement is constitutional *post-NFIB v. Sebelius*

- Individuals will be required to maintain “minimum essential coverage” for themselves and their dependents beginning in 2014.
 - If minimum essential coverage is not maintained, the individual will have to pay a penalty (included on their federal tax return) for each month he or she does not maintain such coverage.

- “Minimum essential coverage” includes:
 - Coverage under government sponsored programs (e.g. Medicare, Medicaid, TRICARE)
 - An eligible employer-sponsored plan
 - Health plan offered in the individual market
 - Grandfathered health plans
 - Certain other coverage, such as state health benefits risk pool.

- There are certain exemptions from the requirement and penalty, for example when coverage is “unaffordable” – i.e. the individual’s required contribution is over 8% of household income for that month (in 2014).

Employer Shared Responsibility Requirement

- “Applicable large employers,” i.e. 50 or more full-time employees (FTEs), beginning in 2014 must offer coverage to FTE and their dependents, or else pay a penalty.
- On December 28, 2012, the IRS issued proposed regulations implementing this employer shared responsibility requirement. The IRS proposed regulations addressed the following issues:
 - “Affordability” of coverage and minimum value;
 - Determining whether an employer is a “large” employer
 - Determining how full time employees are counted
 - Compliance requirements
 - Safe harbors
- Comments on the proposed rule are due on March 18, 2013
- The IRS will hold a public hearing on the regulation on April 23, 2013.

Employer Shared Responsibility Requirement

- Employers are potentially liable for two penalties under the ACA. In the proposed regulation, the IRS refers to them as “4980H(a)” liability and “4980H(b)” liability.
 - The 4980H(a) penalty applies to any employer that does not offer health insurance coverage to employees.
 - The 4980H(b) penalty applies to any employer that does offer health insurance coverage to employees, but the coverage:
 - Is not affordable; OR
 - “Affordable” = 9.5% of household income
 - Does not offer minimum value.
 - “Minimum value” = 60% of total covered health care costs
 - The penalty is NOT triggered unless at least one employee receives a tax credit subsidy for purchasing a plan on an Exchange.
 - The 4980H(a) penalty is equal to \$2,000 times the total number of full-time employees
 - The 4980H(b) penalty is equal to \$3,000 times the number of employees who receive coverage through the Exchange.

- What is an Exchange?
 - State-operated Exchanges v. “Partnership Exchange” v. Federally Facilitated Exchange

- Required notice to employees – employers must give written notice to current employees by March 1, 2013 and to all new hires at the time of hiring informing them of:
 - (1) Existence of an Exchange, its services, how to contact the Exchange for assistance;
 - (2) Availability of premium tax credits and cost sharing reductions if the employer’s health plan covers less than 60% of total allowed costs of benefits, and if employee purchases a QHP on the Exchange; and
 - (3) If the employee purchases a health plan through the Exchange, the employee may lose the employer contribution (if any) to any health benefits plan offered by the employer.

- Under the statute, only “qualified health plans” can be offered on an Exchange, and no tax subsidies are available for any plan that is not a QHP.
- “Qualified health plans” must offer “essential health benefits.”
- “Essential health benefits” include, for example:
 - Inpatient and outpatient hospitalization;
 - Emergency care;
 - Maternal and newborn care;
 - Physician Services;
 - Prescription drugs;
 - Mental health and substance abuse services.
- HHS regulations defining essential health benefits have not been finalized (comment period just closed).
- Important note for employers:
 - “Essential health benefits” ≠ “Minimum essential coverage”

Automatic enrollment requirement

- An employer subject to the Fair Labor Standards Act (FLSA) and have more than 200 full-time employees must
 - Automatically enroll new employees in one of its health benefit plans (subject to any waiting period authorized by state law), and
 - Continue enrollment for current employees

- Employer must also provide the employee with adequate notice and opportunity to opt out of any coverage in which the employee was automatically enrolled

- IRS notice stated that employers need not comply with this provision until the Department of Labor issues regulations
 - Regulations are expected to be completed in 2014

W-2 Reporting

- Purpose of the requirement: informational only, to provide employees useful and comparable consumer information on the cost of their healthcare
- Employers that provide applicable employer-sponsored coverage under a group health plan are required by the ACA to report the cost of coverage under their plans on Form W-2, effective for calendar year 2012 (i.e. Form W-2 generally provided to employees in January 2013).
- Transition relief: IRS has delayed the requirement for employers who file fewer than 250 Forms W-2 for 2012 and until further guidance is issued.

Private Insurance Reforms

- Many private insurance market reforms of the ACA have already been implemented (and most of these provisions applies to group health plans under HIPAA in any event).
 - For grandfathered and non-grandfathered health plans, these include, for example:
 - Coverage must be extended to adult children up to age 26.
 - Lifetime and annual limits on essential health benefits are prohibited (certain exceptions apply for plan years beginning before 2014).
 - Pre-existing conditions exclusions for enrollees under age 19 are prohibited
 - Retroactive rescissions of coverage are prohibited except for fraud, misrepresentation, or nonpayment of premiums.
- **Medical Loss Ratio**
 - Health insurers must spend a certain percentage of premiums on health care services and activities to improve health care quality
 - For insurers in the individual and small group markets – 80 percent.
 - For insurers in the large group market – 85 percent.
 - If the required percentage is not met, health insurer must rebate the difference.
 - For employers with fully insured plans: consider whether the plan or the employer is entitled to the refunds, whether refund is a “plan asset” to be shared with employees, and whether plans should be amended to allow refunds to be retained solely by the employer.
- **Aggregation through Professional Employer Organizations (PEOs)**

Summary of Benefits and Coverage (SBC)

- Purpose: to ensure individuals have a simple, easy-to-understand summary of the benefits and coverage available under their health insurance plan.
- Group health plans and health insurance issuers in the group and individual markets are subject to the SBC requirement.
- Requirement applicable the first day of the open enrollment period that begins on or after September 23, 2012 (or for participants and beneficiaries who enroll outside of an open enrollment period, the first day of the first plan year that begins on or after September 23, 2012.)
- Final rule details the required content elements of the SBC, appearance and form, when a notice of modification must be provided to plan enrollees, beneficiaries and insured individuals, and common definitions.
- Penalties specified in the statute; however, for the first year of implementation, a good faith policy toward compliance.

Questions and Answers





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Immediate Changes to the Work Environment

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- Lactation breaks
- W-2 reporting
- New summary of benefits & coverage and related issues
- Defining “large” employer
- Defining “full-time” employee
- Issues related to Massachusetts health care reform
- Tax credit issues

Lactation Breaks

- Effective in March 2010 as an amendment to the FLSA
- Employers must provide “reasonable break time” for nursing mothers for up to 1 year after the child’s birth
- Time is not compensable unless employer provides paid breaks or if employee is not relieved from duty
- Provide a private location; not a bathroom
- Temporary, as-needed space is ok, but must be functional and free from intrusion
- Law does not specify number or length of breaks
- Employers with fewer than 50 employees may be exempt if “undue hardship” due to significant difficulty or expense in complying with the law

W-2 Reporting

- Employers must report cost of providing benefits on W-2 form
 - Health
 - Dental
 - Vision
 - HSA and HRA
 - Do not have to include employee salary reduction contributions to FSAs
- Supposed to be effective 2011
- Was optional for 2011
- Mandatory for 2012 W-2 unless subject to transition relief
 - Key exception is if you filed fewer than 250 W-2 forms in 2011


New Summary of Benefits & Coverage

- Health plans must provide a “SBC” to participants and beneficiaries upon the first day of coverage, upon renewal or upon request
- Content & form
 - Cannot be more than 4 pages long and must be in 12 point font
 - Presented in a culturally and linguistically appropriate manner
 - Provide a description of coverage, exceptions and cost sharing
 - Provide coverage examples
- Plan must give notice of material modifications that affect the content of the SBC
- A willful failure to provide a compliant SBC to a participant or beneficiary is subject to a fine of up to \$1000 per failure

Summary of Benefits Template

Coverage Period: [See Instructions]

Summary of Benefits and Coverage: What this Plan Covers & What it Costs Coverage for: _____ | Plan Type: _____

 **This is only a summary.** If you want more detail about your coverage and costs, you can get the complete terms in the policy or plan document at [www.\[insert\]](#) or by calling 1-800-[insert].

Important Questions	Answers	Why this Matters:
What is the overall <u>deductible</u> ?	\$	
Are there other <u>deductibles</u> for specific services?	\$	
Is there an <u>out-of-pocket limit</u> on my expenses?	\$	
What is not included in the <u>out-of-pocket limit</u> ?		
Is there an overall annual limit on what the plan pays?		
Does this plan use a <u>network of providers</u> ?		
Do I need a referral to see a <u>specialist</u> ?		
Are there services this plan doesn't cover?		

OMB Control Numbers 1545-2229, 1210-0147, and 0938-1146
Corrected on May 11, 2012

Questions: Call 1-800-[insert] or visit us at [www.\[insert\]](#).
If you aren't clear about any of the underlined terms used in this form, see the Glossary. You can view the Glossary at [www.\[insert\]](#) or call 1-800-[insert] to request a copy.

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Employer Shared Responsibility

- 4980H(a) liability
 - Large employer fails to offer full-time employees and their dependents the opportunity to enroll in an employer-sponsored health plan AND any full-time employee is certified as having received the premium tax credit or cost sharing reduction
 - Determined on a monthly basis
 - If liable, pay 1/12 of \$2000 per employee for ALL full-time employees with the first 30 excluded
- 4980H(b) liability
 - Large employer offers full-time employees and their dependents the opportunity to enroll in its health insurance BUT one or more full-time employee is certified as receiving the premium tax credit or cost sharing reduction because the employer's coverage is unaffordable or does not provide minimum value
 - Also determined on a monthly basis
 - If liable, pay 1/12 of \$3000 for each employee certified

Employer Shared Responsibility

- DOL, IRS and HHS have been trying to coordinate approach with two other issues:
 - Maximum 90-day waiting period
 - Automatic enrollment (on hold)
- Key issue is how to determine full-time status
- Recognition that employers will need time to adjust
- IRS has issued technical guidance and proposed regulations
- Employers can rely on technical guidance until Jan. 1, 2014 and on proposed regulations until final regulations issue

What is a “Large” Employer

- ACA defines a “large” employer as one with on average 50 or more FTEs per month in the prior calendar year
- Under the proposed regulations, full-time is 120 hours per month
- Not a large employer if
 - FTEs exceed 50 for 120 days or less
 - Excess employees are seasonal workers
 - Work must be seasonal in nature and not performed continuously throughout the year
 - Employers may use a reasonable, good faith interpretation of who is a seasonal worker

Who is a Full-Time Employee?

- ACA defines “full-time” as at least 30 hours of service per week
- Regulations establish 130 hours as the monthly equivalent
- Concept of “hours of service”
- Employers are expected to assess whether employees are full-time or not on a monthly basis
- Must use actual hours for hourly employees
- Salaried employees
 - May use actual hours
 - May use equivalency of 8 hours per day or 40 hours per week as an equivalency

Who is a Full-Time Employee

- Recognition that determining full-time status may be difficult
- IRS is giving employers flexibility
- Different rules depending on whether the employee is an on-going employee or a new employee
- For on-going employees, an employer is expected to determine an employee's full-time status by looking back at a "standard measurement period"
- The standard measurement period must be between 3 and 12 months
- A "full-time" employee is one who has on average 30 hours of service per week across the standard measurement period
- The employer must treat the employee as full-time during a subsequent "stability period" of at least six months and no shorter than the standard measurement period
- Employers may use different periods for different categories of employees (salaried vs. hourly, union-represented vs. non-union represented)

New Employees: 90-Day Waiting Period

- Beginning on January 1, 2014, a group health plan cannot impose a waiting period that exceeds 90 days
- Rule does not require the employer to offer health insurance to any particular class of employees
- 90-day period runs from when the employee or dependent is eligible for coverage
- Eligibility based on number of hours worked is acceptable, provided that the condition is not designed to avoid the 90-day limitation

Who Is a Full-Time Employee

- If a new employee is reasonably expected to work full time, then she is a “full-time” employee
- An employer will not owe the assessment for imposing a waiting period of up to 90 days
- For new, variable hour employees, the employer may use an initial measurement period of 3 to 12 months plus an administrative period
- Total time period cannot exceed about 13 months from date of hire
- Must be treated as full-time during the stability period used for on-going employees

4980H(a) Liability

- Employer must offer coverage to **all** full-time employees and their dependents
- Statute contemplates an all-or-nothing scenario
- Regulations adopt a 5% or 5 employees (if larger) rule
- To be an offer, employees must have at least one effective opportunity per year to enroll in coverage or decline coverage

4980H(b) Liability

- What constitutes an offer is the same as under 4980H(a)
- Coverage is affordable if the employee contribution for individual coverage does not exceed 9.5% of the employee's household income
- Regulations create safe harbors:
 - Form W-2: use employee's Box 1 wages from Form W-2
 - Rate of pay: using hourly rate of pay of all hourly employees eligible to participate
 - Federal poverty line: cost does not exceed does not exceed 9.5% of FPL for individual

What about MA Health Care Reform?

- Employer coverage is different
- Federal law does not preempt state law
- Gov. Patrick has signaled intent to repeal fair share contribution law
- For now, have to continue to think about FSC

Next Steps for Employer Shared Responsibility

- Employers need to start planning now
- Effective Jan. 1, 2014, but “look back” to 2013
- IRS is giving employers flexibility
- Consider how to identify full-time, particularly variable hour employees
- If you plan on using “look back,” how long a period?
- Think about how you schedule your employees
- Submit comments on the proposed regulations

Tax Credit for “Small” Employers

- Employers with fewer than 25 FTEs and average annual wages of \$50,000 per FTE
- Must pay 50% or more of the premium cost
- Credit calculated by a formula
- Prior to tax year 2014, the credit is capped at 35% of the employer’s premium expense
- Cap is increased to 50% beginning in 2014

Overall Program Conclusion

- Now that President Obama has been re-elected, implementation of health care reform will proceed ahead.
- Multiple ACA regulations pending in Departments; OMB:
 - Final Exchange regulation
 - Definition of essential health benefits
 - Exchange certification
- Most of these regulations will be issued between now and the end of the year.
- Employers should anticipate that regulations will go into effect as proposed.





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