



Strategic Choices – Finding Your Way Through Health Care Reform

Presented by:

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NFPTM

Potomac Basin Group



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Health Care Reform Seminar

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Agenda

- Introduction
- Key Issues under the Employer Responsibility Requirement
- Break
- Health Coverage Strategies
 - Employer Responsibility Compliance
 - Exchanges
 - Defined Contribution Plans
 - Self-Funding

Introduction



Statutory Provisions

- Employer mandate has 2 penalties:
 - “Large” employers (50 FTEs) that fail to offer “minimum essential coverage” to “full-time” employees (those working 30 hours per week) and their dependents will be subject to a \$2,000 per employee penalty if any full-time employee goes to an Exchange and qualifies for a subsidy. Penalty is calculated based on the number of full-time employees (minus 30).
 - Large employers that offer minimum essential coverage to full-time employees will be subject to a \$3,000 per employee penalty if the coverage is either not “affordable” (9.5% MAGI) or does not meet “minimum value” (fails to cover 60% of costs of benefits offered), and, as a result, any full-time employee qualifies for a subsidy. Penalty is calculated based on the number of full-time employees who obtain a subsidy (with a maximum penalty cap).

Introduction

- Key Issues under the statute are:
 - How to determine who is a “large” employer
 - How to determine who is a “full-time” employee (e.g., how to count hours, particularly for part-time employees)
 - What is “minimum essential coverage”?
 - How to determine if coverage is “affordable” or provides “minimum value”
- Rule is very complex.
 - These slides focus on general rules, but there are many exceptions and special rules.
- Any analysis of possible application or liability under the rule is fact-specific.

“Large” Employer



- “Large” means more than 50 full-time employees (including full-time equivalents)
 - To calculate the number of FTEs for purposes of determining whether an employer is “large,” add the total number of hours of service for that month for part-time employees (but not more than 120 hours of service for any employee) divided by 120. Fractions are taken into account.
 - All employers in a “controlled group” are considered a single employer for these purposes
 - The controlled group rules can be complex (check to see if a controlled group analysis has already been done for your business)

Controlled Group Rules

- Very generally, the following are treated as a single employer:
 - **Parent-subsidiary:** A parent corporation and any 80% (or more) owned subsidiaries
 - **Brother-sister:** When the same five or fewer entities (individuals, estates or trusts) own an at least 80% controlling interest in one company and the same five or fewer entities own more than 50% of each entity
 - **Combined parent-subsidiary and brother-sister**
- Note: there are special attribution rules, so that ownership interests of family members are counted (for example, a individual is considered to own the stock of his spouse or children) as well as attribution rules for partnerships, estates, trusts and corporations

4980H(a): Failure to Offer Coverage

- If employer does not offer coverage to *substantially all* full-time employees (*and their dependents*) and at least one full-time employee receives assistance under Exchange:
 - Must pay annual fee of \$2,000 for each full-time employee minus first 30 employees.
 - For example, if employer has 100 full-time employees and one is eligible for premium assistance under the Exchange, employer must pay \$2,000 times 70 or \$140,000.
 - Statute makes the penalty not tax deductible

***“Full-Time”* Employee Status**

- “Employee” means common law definition of employee
- “Full-Time” means an average of at least 30 hours of service/week or 130 hours of service/calendar month and includes:
 - Each hour for which an employee is paid, or entitled to payment, for performance of duties for any member of employer’s controlled group
 - Paid leave for vacation, holiday, illness, incapacity (including disability), layoff, jury duty, military duty or leave of absence is counted– no limit to hours in these categories
- Rule provides an optional safe harbor that employers may use to determine who is a “full-time employee”

Optional Safe Harbor For Determining “*Full-Time*”

- Ongoing Employees
 - Standard Measurement Period (3-12 months)
 - Standard Stability Period (same as standard measurement period but must be at least 6 months if an employee is full-time during measurement period)
 - Optional Administrative Period (90 days)
- New Employees
 - Full-Time Employees (coverage within 3 months)
 - Variable Hour/Seasonal Employees
 - Initial Measurement Period (3-12 months/Can start on 1st of month following hire date)
 - Initial Stability Period (same as for ongoing)
 - Optional Administrative Period (90 days)

“Substantially All” full-time employees and “their dependents”

- An employer will be deemed to have offered coverage to “Substantially All” full-time employees and their dependents if:
 - Coverage is offered to 95% of Full-Time Employees and their dependents (or, if greater, 5 employees)
 - Failure to offer to 5% need not be inadvertent (i.e., planning opportunity)
 - Does not eliminate penalty for 5%
- The employer is required to offer coverage to “dependents”
 - Does not include spouse (planning opportunity)
 - Does include son, daughter, stepson, stepdaughter, adopted child, child placed for adoption, and foster child up to age 26 (measured on day he/she attains age 26).

4980H(b): Insufficient Coverage

- If employer does offer “minimum essential coverage” to full-time employees (and their dependents) and a full-time employee receives assistance under Exchange, employer must pay fee if either test is not met:
 - Employer coverage not affordable – cost of self-only coverage is more than 9.5% of household income
 - Plan does not provide 60% actuarial value of benefits.
- Annual penalty is the lesser of: \$3,000 for each full-time employee receiving premium assistance; or \$2,000 for each full-time employee, minus first 30 employees.

Selected Key Issues in the Rule

- Change in employment status
- Break in service/ leave of absence rules
- Seasonal employees
- Transition issues



Change in Employment Status

- Special rule for new variable hour or seasonal employees who experience material change in position of employment during initial measurement period
- If employee would have been reasonably expected to work full-time if in new status at hire date, employee generally must be treated as full-time as of first day of fourth month following change
- Rule does not apply to ongoing employees

Break in Service/Leave of Absence Rules

- Rules on application of safe harbor to employees rehired after termination or returning after leaves of absence
- Treat as new employee --
 - If period of no service was 26 weeks or more; or
 - Under optional "rule of parity"
 - Otherwise, treat as continuing employee with same status for that stability period
 - For employees returning after special unpaid leave (FMLA, USERRA, jury duty) –
 - Exclude special unpaid leave period; or
 - Credit hours of service for leave period at average weekly rate outside period
 - Special rule for continuing employees of educational organizations

Seasonal Employees

- Seasonal “employee” not defined
 - Note that seasonal “worker” is defined, but for a limited purpose
- Employers may use reasonable, good faith interpretation until further guidance
- Preamble suggests possibility that future guidance may provide specific time limit (e.g., up to 6 months)
- Also tied to particular season(s)?



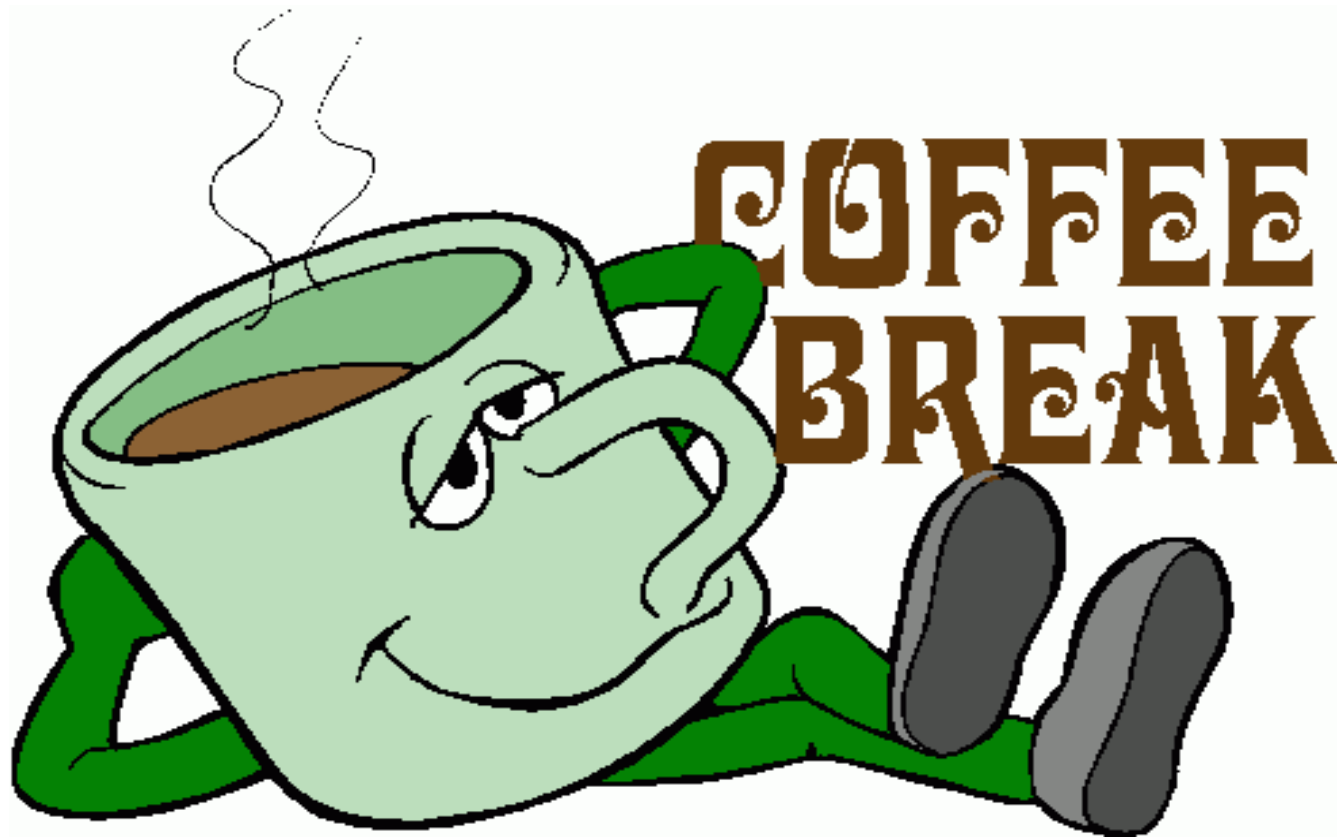
Transition Issues – All Plans

- Applicable large employer determination for 2014 based on any 6-month period in 2013
- Reduced measurement period (at least 6 months, beginning by July 1, 2013 and ending at least 90 days before 2014 plan year) for 2014 stability period
- Dependent coverage not required to be offered in 2014 if employer not offering currently takes steps during 2014 plan year to offer to dependents
- Variable hour employee determination for 2014 -- objective facts and circumstances that new employee's employment to be of limited duration

Transition Issues – Non-Calendar Year Plans

- Delayed effective date to first day of 2014 plan year for certain employees eligible under terms in effect on December 27, 2012
- Additional relief for employers with significant percentage of employees eligible or covered under non-calendar year plans
 - Employers that have at least $\frac{1}{4}$ of its employees covered under one or more non-calendar year plans that have the same plan year as of 12/27/12 or offered coverage under those plans to $\frac{1}{3}$ or more of its employees during the most recent open enrollment period
- Employer permitted to allow salary reduction elections, revocation or changes for health coverage for cafeteria plans with fiscal year beginning in 2013

Intermission





Health Coverage Strategies

- Affordability
- Bronze Coverage
- Managing Your Workforce
- Demonstrating Compliance with the Statute

“Affordability Safe Harbors”

- Coverage is affordable if required employee contribution for self-only coverage for the lowest cost option that provides minimum value does not exceed 9.5% of:
 - W-2 Wages for that calendar year
 - Hourly rate of pay x 130 or monthly salary (does not apply if wages reduced)
 - The most recently published federal poverty level for a single individual

Minimum Value: Bronze Coverage

- “Bronze” coverage is insured coverage with an actuarial value of 60%
- Coverage that meets the bronze level requirements will meet the requirement to provide minimum value
- To avoid the penalty, employers are required to offer coverage – employees are not required to accept it

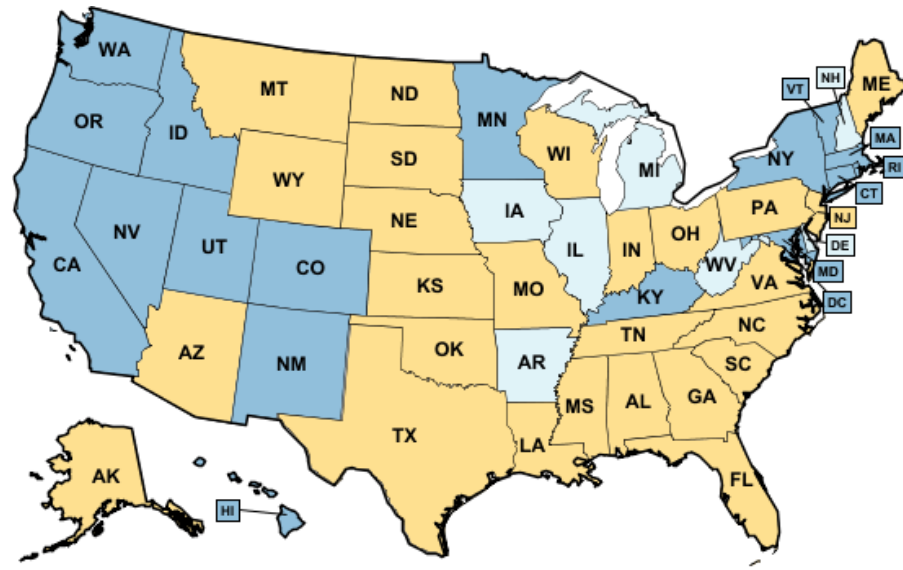
Managing Your Workforce

- Popular press reporting on employers that are taking steps to avoid the penalty
 - Cutting hours and / or terminating employees
- Be aware
 - **ERISA 510** – employers may not “discharge, fine, suspend, expel, discipline or discriminate against a participant or beneficiary ... for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan ...”
 - **ACA 1558** – “No employer shall discharge or in any manner discriminate against any employee with respect to his or her compensation, terms, conditions, or other privileges of employment because the employee ... has” received a health premium tax credit, or is a whistleblower
 - Also other ACA provisions prohibiting discrimination
 - Investigations (broad subpoena authority under ERISA § 504) or litigation against plan fiduciaries

Demonstrating Compliance with the Statute

- Must you use the safe harbor?
 - “The Treasury Department and the IRS anticipate that a significant majority of employers will use some form of the *optional* look-back measurement method described in these proposed regulations to identify full-time employees.” 78 Fed. Reg. at 223 (emphasis added).
- How do you comply if you do not use the safe harbor?
 - Agencies to date have explained, revised and expanded upon the look-back safe harbor, so not much guidance available.
 - Monthly tracking?
 - Statute imposes penalties on any large employer that fails to offer full-time employees minimum essential coverage **for that month**.

Exchanges



- Default to Federal Exchange
- Declared State-based Exchange
- Planning for Partnership Exchange

State Decisions For Creating Health Insurance Exchanges, as of February 15, 2013: Exchange Decision



Key Open Exchange Issues

- Exchange Notice
 - Statute required employers to provide a notice of the availability of Exchange coverage by March 1, 2013
 - Recent FAQ delayed the notice requirement until “late summer or fall of 2013, which will coordinate with the open enrollment period for Exchanges” FAQ Part XI, Q1.

Key Open Exchange Issues

Public Exchanges

- Advantages
 - Subsidies
 - Community rating (individual and small group)
- Disadvantages
 - Closed to large groups
 - Limited 125 plan use
- Uncertainties
 - Cost-effective coverage
 - Federal vs. state exchanges
 - Issuer participation
- For?
 - Part-time employees
 - Retirees

Private Exchanges

- Advantages
 - Open to large groups
 - Experience rating for large groups
 - 125 plans
- Disadvantages
 - No subsidies
- Uncertainties
 - Cost-effective coverage
 - Issuer participation
 - Individual coverage?
- For?
 - Full-time employees

Defined Contribution Plans

- New guidance limits use of HRAs
 - HRAs that are not “integrated” with group health insurance coverage that complies with the ACA violate the ACA’s requirement not to place annual dollar limits on essential health benefits
 - Result: “stand-alone” HRAs cannot be used to purchase individual market coverage

Self-Funding (+ stop-loss)

- Potentially exempt from almost everything (MLR, rate review, EHBs even though small employer, community rating, health insurer fee)
- States ability to regulation stop loss with low attachment points as group health insurance is questionable, federal ability to regulate under the ACA is questionable
- But the Agencies have options under both ERISA and the PHSA to limit the use of self-funding
 - Note that the agencies have asked for comments about self-funding, including comments on “low” attachment points
 - We understand that agencies continue to be actively interested in this issue

Fees

- **PCORI** – applies to health insurance issuers and group health plans (sunsets in 2019)
- **Reinsurance** – applies to health insurance issuers and group health plans (\$63 per member for the first year, ends in 2016)
- **Risk Adjustment** – applies to health insurance issuers selling individual and small group plans
- **Health Insurer Fee** – applies to health insurance issuers
- **Exchange User Fees** – will be imposed on all insurance coverage in the individual and small group market for FF-SHOPs
- **Cadillac Plan Tax** – 40% excise tax for plan values over a threshold (begins in 2018)

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