The Affordable Care Act ("ACA")
Shared Responsibility and Employer Health Care ("Pay or Play") Mandate

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Affordable Care Act ("ACA")

- On June 28, 2012, the U.S. Supreme Court upheld the constitutionality of ACA by a narrow 5-4 margin.
- On January 2, 2013, the Internal Revenue Service (the "IRS") issued proposed regulations providing updated guidance on the employer ("pay or play") mandate.
Individual Mandate
Individual Mandate
Overview

EFFECTIVE JANUARY 1, 2014

All U.S. residents are required to maintain “minimum essential coverage” unless the individual falls within an exception.

Exceptions:

• Individuals with a religious conscience exemption.
• Incarcerated individuals.
• Undocumented aliens.
• Individuals in a hardship situation (to be determined by the U.S. Dept. of Health and Human Services (“HHS”)).
Individual Mandate Exception (cont’d):

• Individuals with a coverage gap of less than 3 months.
  ✓ If coverage gap is greater than 3 months, each month in the gap is subject to penalty.

• Individuals with income below the federal income tax filing threshold.
  ✓ The filing threshold generally is the sum of a taxpayer’s applicable exemption amount and applicable standard deduction amount.
  ✓ E.g., income tax filing threshold for a single taxpayer for 2013 is $10,000 ($3,900 personal exemption + standard deduction of $6,100).

• Individuals who cannot afford coverage because their “required contribution” exceeds 8% (indexed after 2014) of the individual’s household income for the year.

• Members of Indian tribes.
Individual Mandate
Coverage Requirements

What is “Minimum Essential Coverage”? 

• Government-sponsored Program.
  ✓ Medicaid.
  ✓ Medicare.
  ✓ Children’s Health Insurance Program coverage (“CHIP”).
  ✓ TRICARE (i.e., U.S. Military health care coverage).
  ✓ Veterans Affairs coverage.
  ✓ Peace Corps volunteers coverage.

• Employer-sponsored Plans.
  ✓ Governmental plans.
  ✓ Grandfathered plans.
  ✓ Other plans offered in small or large group market.

• Health plans offered in the individual market.

• Other coverage (must be considered minimum essential coverage by HHS and IRS).
“Monthly penalty amount” for not having minimum essential coverage is \( \frac{1}{12} \) of greater of (i) the sum of an applicable dollar amount per individual taxpayer (and spouse on joint return) and each claimed dependent (or, if less, 300% of the applicable dollar amount) or (ii) a percentage of the taxpayer’s household income for the year.

- **Applicable dollar amount** is $95 in 2014, $325 in 2015, $695 in 2016, and after 2016, $695, as indexed for inflation. (Applicable dollar amount is halved for dependents under age 18.)

- **Percentage of the taxpayer’s household income** is an amount equal to a percentage of the household income in excess of the tax filing threshold for the year (which percentage is phased in at 1% in 2014, 2% in 2015, and 2.5% after 2015).
• **ANNUAL** penalty (i.e., the sum of the “monthly penalty amounts”) will be capped at an amount equal to the national average premium for qualified health plans that have a bronze level of coverage (for the applicable family size) available through the state exchanges.
Example: A single taxpayer does not have minimum essential coverage for 6 months in 2014. The individual’s household income for 2014 is $50,000.

- Taxpayer’s “monthly penalty amount” is 1/12 of greater of (i) $95 or (ii) 1% of the excess of $50,000 over his or her tax filing threshold.
- If we assume tax filing threshold for 2014 is $10,000, taxpayer’s “monthly penalty amount” is 1/12 of greater of (i) $95 or (ii) $400 (i.e., 1% x [$50,000 - $10,000]).
- 1/12 of $400 equals $33.34. 6 months x $33.34 = $200. So the taxpayer’s penalty for 2014 (subject to cap in previously slide) is $200.
Individual Mandate
Enforcement

• Penalty will be paid like a federal income tax penalty and will be enforced by the IRS.
  ➢ Refunds and credits may be used by the IRS to collect the penalty.
  ➢ Individuals who fail to pay the penalty will not, however, be subject to criminal penalties, liens or levies.
Eligibility for Premium Tax Credit:

- Individual taxpayers with household income of from 100% (138% if state opts to expand Medicaid) to 400% of the federal poverty level.
  - Married couples must file a joint return.
  - No credit is allowed to an individual claimed as a dependent by another.

- An individual eligible for minimum essential coverage other than on the individual market--i.e., through (i) a government-sponsored program (e.g., Medicaid, Medicare, and TRICARE) or (ii) an employer-sponsored plan that is affordable and provides minimum value--is **NOT** eligible for the tax credit.
Eligibility for Premium Tax Credit:

- **Exception:** Employees eligible for (but not covered by) employer-sponsored coverage that is **not** affordable or does **not** provide minimum value are eligible for the tax credit.
  
  - **Not Affordable:** Self-only coverage costs employee more than 9.5% of household income.
  
  - **Not Minimum Value:** Plan’s share of the “total allowed costs of benefits provided under the Plan” is less than 60% of such costs. (Basically, an actuarial value determination.)
Amount of the premium tax credit that a taxpayer can receive is based on the premium for the second lowest cost silver plan in the exchange area where the taxpayer is eligible to purchase coverage.

- A silver plan is a plan that provides coverage for benefits actuarially equivalent to 70% of the full actuarial value of benefits.

The amount of the premium tax credit varies with a taxpayer’s household income, such that as a result of the premium tax credit, the net premium for the individual for coverage at the second lowest cost silver plan will not exceed a specified applicable percentage of household income.
The premium tax credit for an applicable coverage month in a taxable year is the lesser of:

- The monthly premium for the month for one or more qualified health plans offered in the individual market that cover the individual taxpayer (and spouse and dependents, if applicable) and that he or she enrolled in through a state exchange, and
- The excess of the monthly premium for the second lowest cost silver plan over $1/12 of (i) the applicable percentage (from the table on the following slide) multiplied by (ii) the taxpayer’s household income for the taxable year.
## Individual Mandate

### Amount of Premium Tax Credit

<table>
<thead>
<tr>
<th>Income Level</th>
<th>Premium Percentage of Household Income (Sliding Scale)</th>
</tr>
</thead>
<tbody>
<tr>
<td>100% to 133% FPL</td>
<td>2%</td>
</tr>
<tr>
<td>133% to 150% FPL</td>
<td>3% to 4%</td>
</tr>
<tr>
<td>150% to 200% FPL</td>
<td>4% to 6.3%</td>
</tr>
<tr>
<td>200% to 250% of FPL</td>
<td>6.3% to 8.05%</td>
</tr>
<tr>
<td>250% to 300% FPL</td>
<td>8.05% to 9.5%</td>
</tr>
<tr>
<td>300% to 400% FPL</td>
<td>9.5%</td>
</tr>
</tbody>
</table>
## Individual Mandate
### Amount of Premium Tax Credit

<table>
<thead>
<tr>
<th></th>
<th>100%</th>
<th>133%</th>
<th>150%</th>
<th>200%</th>
<th>250%</th>
<th>300%</th>
<th>400%</th>
</tr>
</thead>
<tbody>
<tr>
<td>SINGLE</td>
<td>$11,490</td>
<td>$15,282</td>
<td>$17,235</td>
<td>$22,980</td>
<td>$28,725</td>
<td>$34,470</td>
<td>$45,960</td>
</tr>
<tr>
<td>COUPLE</td>
<td>$15,510</td>
<td>$20,628</td>
<td>$23,265</td>
<td>$31,020</td>
<td>$38,775</td>
<td>$46,530</td>
<td>$62,040</td>
</tr>
<tr>
<td>FAMILY OF 3</td>
<td>$19,530</td>
<td>$25,975</td>
<td>$29,295</td>
<td>$39,060</td>
<td>$48,825</td>
<td>$58,590</td>
<td>$78,120</td>
</tr>
<tr>
<td>FAMILY OF 4</td>
<td>$23,550</td>
<td>$31,322</td>
<td>$35,325</td>
<td>$47,100</td>
<td>$58,875</td>
<td>$70,650</td>
<td>$94,200</td>
</tr>
</tbody>
</table>
Individual Mandate
Premium Tax Credit

• Premium tax credits generally will be advanced by the IRS to the insurance plan in which the taxpayer enrolls, with the taxpayer paying the remaining portion of the premium charged by the plan.
  ➢ Reconciliation of the advance credit with the actual year-end calculated tax credit will occur on the taxpayer’s income tax return.

• ACA requires the state exchanges to report to the IRS and provide to the taxpayer enrollee certain specific information in connection with the taxpayer’s premium tax credit.
Individual Mandate
Cost-Sharing Subsidy

• The cost-sharing subsidy reduces the maximum out-of-pocket limit of an eligible insured.
  ➢ Reduction cannot result in increase in the health plan’s share of the cost of benefits beyond certain limits, however.

• An eligible insured is an individual who enrolls in a silver plan through a state exchange and whose household income is from 100% to 400% of the federal poverty level.

• The amount of the cost-sharing subsidy depends on the eligible insured’s household income:

<table>
<thead>
<tr>
<th>Income Level</th>
<th>Reduction in Out-of-pocket Liability</th>
</tr>
</thead>
<tbody>
<tr>
<td>100% to 200% FPL</td>
<td>2/3 of maximum out-of-pocket</td>
</tr>
<tr>
<td>200% to 300% FPL</td>
<td>1/2 of maximum out-of-pocket</td>
</tr>
<tr>
<td>300% to 400% FPL</td>
<td>1/3 of maximum out-of-pocket</td>
</tr>
</tbody>
</table>
Medicaid Expansion
Medicaid Expansion

- Medicaid is part of the ACA spectrum of individual health insurance coverage and is considered a qualifying health plan for purposes of the employer and individual coverage requirements.

- Before the ACA, Medicaid generally has covered working age (under 65) adults only when they (i) have children enrolled in CHIP and Medicaid, (ii) have a permanent disability, or (iii) have been unemployed for a specified period of time.
  - Medicaid expansion will significantly expand the coverage of working age adults.

- The federal government matches state dollars to fund Medicaid.
  - Enhanced federal matching for the expansion population.
Medicaid Expansion

• The U.S. Supreme Court decision on June 28, 2012 made state Medicaid expansion optional for the states.

• The state exchanges, however, still will process and enroll an applicable individual in the appropriate program—exchange coverage, Medicaid or CHIP—regardless of the program for which the individual applies.

  ➢ Medicaid will be integrated with the state exchanges.

• In states that do not expand, more individuals (i) will be eligible for, and may choose to purchase coverage under, the state exchange, and (ii) will be eligible for a premium tax credit and cost-sharing subsidy through the exchange.
Medicaid Expansion

Where states currently stand on state Medicaid expansion:

• 15 states not participating (including Georgia, Alabama, South Carolina and North Carolina);
• 3 states are leaning towards not participating;
• 2 states are leaning towards participating;
• 25 states plus Washington, D.C. participating; and
• 5 states are undecided (including Tennessee).
State-based Health Insurance Exchanges
State-based health insurance exchanges created under the ACA will be a key part of expanding health insurance coverage under the ACA.

- The health insurance exchange will be a marketplace where individuals and small businesses and their employees can compare and purchase insurance coverage.
- Eligible consumers will be able to access the exchanges through websites.
- Eligible individuals also will be entitled to subsidies in the form of premium tax credits and reductions in cost sharing.
Health Insurance Exchanges

- A state can (i) establish and operate its own exchange, (ii) work with other states to establish regional exchanges, (iii) run an exchange in partnership with the federal government, or (iv) have HHS operate a federally-facilitated exchange for the state.
  - 26 states (including Georgia) have indicated they will let the federal government run the exchanges.
  - 7 states plan to partnership with the federal government.
  - 17 states and Washington, D.C. will run their own exchanges.

- Open enrollment in the exchanges is scheduled to begin in October 2013, for individuals who do not have access to insurance through an employer or qualify for Medicaid or CHIP.
  - Coverage will take effect January 2014.
  - The exchanges also will help individuals who are eligible for Medicaid or CHIP to enroll in those programs.
Additional features of the exchanges:

• The exchanges must certify that the health plans available for purchase on the exchanges are “qualified health plans,” which means they satisfy certain specifications, which include offering “essential health benefits.”

• The exchanges will have “navigators” (i.e., skilled workers knowledgeable about local markets and plans) to help individuals and small businesses purchase insurance.

• In addition, the exchanges’ websites will assist consumers in comparing premiums of qualified health plans, calculating any applicable tax credit, and choosing a plan.

• HHS recently proposed assessing a 3.5% user fee on all insurance plan premiums sold through federally-facilitated exchanges, to fund the exchanges.
Levels of coverage under the health plans:

• **Bronze.** Coverage that provides benefits that are actuarially equivalent to 60% of the total allowed costs of benefits under the plan.

• **Silver.** Coverage that provides benefits that are actuarially equivalent to 70% of the total allowed costs of benefits under the plan.

• **Gold.** Coverage that provides benefits that are actuarially equivalent to 80% of the total allowed costs of benefits under the plan.

• **Platinum.** Coverage that provides benefits that are actuarially equivalent to 90% of the total allowed costs of benefits under the plan.

* In addition, individuals under age 30, or exempt from the individual mandate because no affordable plan is available to them or because of hardship, also may purchase a catastrophic plan.
Health Insurance Exchanges

Essential Health Benefits*

(1) Ambulatory patient services.
(2) Emergency Services.
(3) Hospitalization.
(4) Maternity and newborn care.
(5) Mental health and substance use disorder services, including behavioral health treatment.
(6) Prescription drugs.
(7) Rehabilitative and habilitative services and devices.
(8) Laboratory services.
(9) Preventative and wellness services and chronic disease management.
(10) Pediatric services, including oral and vision care.

* The benchmark plan for Georgia is the Blue Cross Blue Shield of Georgia HMO Urgent Care 60 Copay plan.
Employer ("Pay or Play") Mandate
Concerns for employers:

- **Labor cost increases resulting from**
  - Higher benefits costs to meet health plan requirements,
  - Potentially more employees electing plan coverage because of individual mandate, and
  - Employer having to pay penalties if it does not comply with the law.

- **Evolving/incomplete guidance and unanswered questions regarding compliance, e.g.:**
  - Any possibility of reasonable good faith compliance standard for 2014?
  - Mandated successor liability in corporate transactions?
  - What about collective bargaining agreements that cannot be changed?
  - Clarification of coverage obligations of new employers?
  - Relief from offering coverage to Medicaid eligible individuals?
Employer Mandate ("Pay or Play")

- **Effective January 1, 2014.*
- Applies to employers with 50 or more full-time employees (including “full-time equivalent” employees).
- Beginning in 2014, Employer pays penalty if it
  - does not offer “minimum essential coverage” to at least 95% of its full-time employees (and--subject to a transition rule for 2014--dependents), or
  - offers minimum essential coverage to full-time employees, but employees bear too much of the cost.
Employer Mandate (‘‘Pay or Play’’)

*Transition Relief for Plans with Non-calendar Plan Years:

• **Transition Relief 1:**
  - If employer maintains a non-calendar year plan as of December 27, 2012, relief applies to employees who would be eligible for coverage under terms of the plan in effect on December 27, 2012, as of first day of the plan year that begins in 2014.
  - No penalty with respect to such an employee for period prior to 2014 plan year if employee is offered affordable, minimum value coverage by first day of the 2014 plan year.

• **Transition Relief 2:**
  - If employer has at least one-fourth of its employees covered under a non-calendar year plan as of December 27, 2012, or offered coverage under a non-calendar year plan to at least one-third of its employees during the most recent open enrollment period before December 27, 2012.
  - No penalty with respect to an employee for period prior to 2014 plan year if employee is offered affordable, minimum value coverage by first day of the 2014 plan year.
Determination of 50 or more full-time employees is determined based on *average number of employees employed by employer during preceding calendar year.*

- Determine no. for each month, add no. for each of the 12 months, and divide total by 12.
- **Transition rule for 2014** allows employer to determine such “applicable large employer” status by reference to period of at least 6 consecutive months in 2013, rather than entire 2013 calendar year.
- For employers not in existence the preceding calendar year, focus (both expectation and actual employment) is on current calendar year.

Full-time (and full-time equivalent) employee count is determined on “controlled group” and “affiliated service group” basis.

- No separate line of business exception.
- All employees of trades or businesses under common control are treated as employed by a single employer for this purpose.
- All employees of members of an affiliated service group are treated as employed by a single employer for this purpose.
- Treasury regulations under IRS Code Section 414 provide detailed rules.
50 or More Full-time Employees

Determination Process:

- All full-time employees (employees who average at least 30 hours of service a week for the month (130 hours a month)), plus

- **Full-time equivalency** determined for part-time employees for the month (divide total hours of service of all part-time employees (but not more than 120 for any one PTE) for month by 120).
  - E.g., 1 part-time employee who works 60 hrs/month + 1 part-time employee who works 60 hrs/month = 1 full-time equivalent.
  - E.g., 3 part-time employees who work 40 hrs each per month = 1 full-time equivalent.

- **Note**: Full-time equivalency is used only to determine if an employer is subject to the pay or play mandate.
  - There is no requirement under ACA to offer health coverage to part-time employees.
  - Seasonal workers’ hours are counted in the large employer determination, unless the employer has 50 or more full-time (and full-time equivalent) employees for only 120 days (4 calendar months may be treated as the equivalent of 120 days)--which do not have to be consecutive—or less during the preceding calendar year and the employees in excess of 50 during such period are seasonal workers.
Hours of Service:

• Each hour for which an employee is paid, or entitled to payment, for work for the employer; and
• Each hour for which an employee is paid for vacation, holiday, illness, incapacity (including disability), layoff, jury duty, military duty, or leave of absence.
  ➢ Hours of service do not include hours worked outside the U.S. if compensation for such hours constitutes foreign source income.

Determination:

• **Hourly employees.** Based on actual hours worked and hours for which payment is due.
• **Non-hourly employees.** 3 alternatives:
  (i) Actual hours;
  (ii) Days-worked equivalency of 8 hours/day; or
  (iii) Weeks-worked equivalency of 40 hours/week.
Hours of Service Determination (cont’d):

- An employer may apply different non-hourly employee equivalency methods for different classifications of non-hourly employees, as long as the classifications are reasonable and consistently applied.

- Use of the days-worked or weeks-worked equivalency methods is prohibited, however, if it would result in a substantial understatement of an employee’s hours of service that could cause the employee not to be treated as full-time.

- Employers with employees compensated on a commission basis, adjunct faculty, transportation employees, and analogous employment positions must use a reasonable method for crediting hours of service consistent with the IRS proposed regulations.
Large Employer Example

- Company employs the following:
  - 25 employees averaging 30 or more hours per week during 2013;
  - 30 employees each work 80 hours per month during 2013; and
  - No seasonal workers.

  *Full-time Equivalent Calculation*

  \[
  \frac{(30 \text{ employees} \times 80 \text{ hours})}{120} = 20 \text{ full-time equivalent employees}
  \]

- Company employs an average of 45 employees during 2013 (25 full-time employees + 20 full-time equivalents).
- Company is not subject to the employer mandate in 2014.
Seasonal Workers

- Under IRS proposed regulations, a seasonal worker means an employee who performs services on a seasonal basis, including particularly (but not limited to) agricultural workers and holiday season retail workers.

- Services are performed on a seasonal basis where the employment, ordinarily, “pertains to or is of the kind exclusively performed at certain seasons or periods of the year and which, from its nature, may not be continuous or carried on throughout the year.”

- An employer may use a reasonable, good faith interpretation of the term “seasonal worker” in making its determination.

- **Note:** Although the large employer determination special exception for seasonal workers focuses on employment for only 120 days or less, an employee is not necessarily excluded from being classified as a seasonal worker because he or she works on a seasonal basis more than 120 days.
Large Employer Determination with Seasonal Workers

• Employer employs 45 full-time (and full-time equivalent) employees for each of the calendar months of January - September, 2013.

• Employer hires an additional 25 full-time employees (i.e., work 130 or more hours per month) to assist with the holiday retail period for the calendar months of October - December, 2013, for a total of 70 full-time (and full-time equivalent) employees for October – December, 2013.

• Employer’s average number of full-time (and full-time equivalent employees) for 2013 is \[\frac{45 \times 9 + 70 \times 3}{12} = \frac{615}{12} = 51\] full-time (and full-time equivalent) employees. So, ordinarily, the employer would be a large employer subject to the employer mandate.

• However, because the employer has 50 or more full-time (and full-time equivalent) employees for 120 days or less and the employees in excess of 50 during such period are seasonal workers, the employer is not considered as employing 50 or more full-time employees during 2013 and is not subject to the employer mandate.
# Large Employer Recap

<table>
<thead>
<tr>
<th>Type of Employee</th>
<th>Counts in Determining Large Employer?</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Full-Time Employees</strong></td>
<td>Yes</td>
</tr>
<tr>
<td>An employee who works an average of 30 or more hours per week (130 hours per month).</td>
<td></td>
</tr>
<tr>
<td><strong>Part-time Employees</strong></td>
<td>Yes: Total all part-time employee hours worked each month (but not more than 120 for any one PTE) and divide by 120 to get average number of full-time equivalent employees per month.</td>
</tr>
<tr>
<td>An employee who works an average of less than 30 hours per week.</td>
<td></td>
</tr>
<tr>
<td><strong>Seasonal Workers</strong></td>
<td>Yes, unless employer has 50 or more full-time (and full-time equivalent) employees for 120 days (which do not have to be consecutive) or less and the employees in excess of 50 during such period are seasonal workers.</td>
</tr>
<tr>
<td>An employee who performs services on a seasonal basis, including (but not limited to) agricultural workers and holiday season retail workers. Employers may use a reasonable, good faith interpretation of the term. (An employee is not necessarily excluded from being classified as a seasonal worker because he or she works on a seasonal basis more than 4 months.)</td>
<td></td>
</tr>
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</table>
Penalties
Penalties apply on a company-by-company basis.

- Application of penalties separately with respect to each member of an employer controlled group means penalties will only be based on employees of an applicable noncompliant company within the employer controlled group.
  - Wonderful news for employers.
  - A slip-up by one subsidiary corporation in failing to offer coverage will not result in a penalty for all related companies.
  - Allows for planning, e.g., where one subsidiary chooses for business purposes not to offer coverage but others do offer coverage.
  - With respect to Penalty One, the 30-employee reduction is allocated among the members of the employer controlled group ratably based on number of full-time employees employed by each.
Penalty General Rules

Penalties only apply with respect to full-time employees.
• Full-time equivalents are **not** included in penalty determinations.

Employer mandate penalties are not deductible.
• In contrast, employer-provided health coverage provides tax advantages, i.e., employer tax deduction for coverage provided and FICA tax savings.
• Also, employees can pay for employer-provided health coverage pre-tax under employer-sponsored IRS Code Section 125 cafeteria plan.

Penalties apply on a company-by-company basis.
• Although 50 or more full-time (and full-time equivalent) employee count is determined on “controlled group” and “affiliated service group” basis, **penalties apply separately with respect to each applicable member of the employer group.**
  ➢ So where, e.g., a corporation has multiple subsidiaries, the IRS will look at each subsidiary separately to determine if it has complied with the employer mandate.
Employer does not Offer Minimum Essential Coverage to at least 95% of Full-time Employees

Two Requirements:

- Employer fails to offer “minimum essential coverage” to more than 5 percent (or, if greater, more than 5) of its full-time employees (and, subject to a transition rule for 2014, dependents), and

- At least one full-time employee (i) purchases health insurance coverage through a state exchange and (ii) is entitled to a premium tax credit or cost sharing subsidy.

* Note that a large employer will not be treated as failing to offer coverage to an employee whose coverage is terminated during a coverage period solely due to the employee failing to timely pay premiums. (Rules similar to those under COBRA will apply for determining timeliness of premium payment.)
**Penalty One (Pay or Play)**

“Minimum essential coverage” is virtually any medical coverage an employer offers to its employees that does not consist of HIPAA excepted benefits (such as stand-alone dental and vision, disability, etc.).

- Minimum essential coverage is **not** the same as “essential health benefits.”
  - No requirement that an employer-sponsored plan offer all categories of essential health benefits.

- Besides employer-sponsored plans, minimum essential coverage includes the following:
  - **Government-sponsored programs** (including Medicaid, Medicare, CHIP (i.e., Children’s Health Insurance Program coverage), TRICARE (i.e., U.S. Military health care coverage), coverage through Veterans Affairs, and coverage for Peace Corps volunteers);
  - **Governmental employer plans**; and
  - **Health plans offered in the individual market.**
Penalty One \( (Pay \text{ or } Play) \)

Employer does not Offer Minimum Essential Coverage to at least 95% of Full-time Employees

- A full-time employee’s “dependent” means a child of the employee who has not attained age 26.
  - A spouse is \textbf{not} considered a dependent for purposes of the employer mandate.

- Transition rule for 2014: An employer that takes steps in its 2014 plan year toward satisfying the dependent coverage requirement will not be subject to a penalty solely for failure to offer coverage to dependents for the 2014 plan year.
Penalty One (*Pay* or *Play*)

**Employer does not Offer Minimum Essential Coverage to at least 95% of Full-time Employees**

- **Eligibility for Premium Tax Credit**: Individual taxpayers with household income of from 100% (138% if state opts to expand Medicaid) to 400% of the federal poverty level.
  - Married couples must file a joint return.
  - No credit is allowed to an individual claimed as a dependent by another.

- An individual eligible for minimum essential coverage other than on the individual market—i.e., through (i) a government-sponsored program (e.g., Medicaid, Medicare, and TRICARE) or (ii) an employer-sponsored plan that is affordable and provides minimum value—is **NOT** eligible for the tax credit.
Penalty One (*Pay or Play*)

Employer does not Offer Minimum Essential Coverage to at least 95% of Full-time Employees

- Employer must pay $166.67/month (i.e., $2,000 per year) x number of full-time employees greater than 30.
  - Note that penalty is calculated monthly but then total cumulative penalty for the year is paid by employer annually.
  - $2,000 amount will be adjusted for inflation for years after 2014.

- **Example 1:** Employer A has 100 full-time employees and 50 part-time employees; does not offer minimum essential coverage for the year; and has at least one full-time employee purchase health insurance coverage through a state exchange who is entitled to a premium tax credit or cost sharing subsidy.
  - Employer A must pay annual penalty of $2,000 x (100-30) = $2,000 x 70 = $140,000.
Penalty One (Pay or Play)

Employer does not Offer Minimum Essential Coverage to at least 95% of Full-time Employees

• **Example 2:** Employer B has 70 full-time employees and 100 part-time employees; does not offer minimum essential coverage for the year; and has at least one full-time employee purchase health insurance coverage through a state exchange and receive a premium tax credit or cost sharing subsidy.
  ➢ Employer B must pay annual penalty of $2,000 x (70-30) = $2,000 x 40 = **$80,000**.

• **Example 3:** Employer C has 30 full-time employees and 150 part-time employees; does not offer minimum essential coverage for the year; and has at least one full-time employee purchase health insurance coverage through a state exchange and receive a premium tax credit or cost sharing subsidy.
  ➢ Employer C must pay annual penalty of $2,000 x (30-30) = $2,000 x 0 = **$0.00**.
Penalty One (Pay or Play)

Employer does not Offer Minimum Essential Coverage to at least 95% of Full-time Employees

• **Example 4:** Parent Company X (“Parent X”) has 60 full-time employees and 20 part-time employees. Parent X’s wholly-owned subsidiary company, Subsidiary Y, has 30 full-time employees. Parent X offers minimum essential coverage to all of its full-time employees for the year, but Subsidiary Y fails to offer minimum essential coverage to 10 of its 30 full-time employees (and has at least one full-time employee purchase health insurance coverage through a state exchange and receive a premium tax credit or cost sharing subsidy).

  - Parent X is not subject to a Penalty One under the employer mandate.
  - Subsidiary Y must pay annual penalty of $2,000 x (30-10*) = $2,000 x 20 = **$40,000**.

* Subsidiary Y’s ratable share of reduction for Penalty One purposes: 30/90 x 30 = 10.
Penalty One (Pay or Play)

Employer does not Offer Minimum Essential Coverage to at least 95% of Full-time Employees

- **Example 5:** Parent X has 60 full-time employees and 20 part-time employees. Parent X’s wholly-owned subsidiary company, Subsidiary Y, has 30 full-time employees. Parent X offers minimum essential coverage to all of its full-time employees for the year, but Subsidiary Y fails to offer minimum essential coverage to 5 of its 30 full-time employees (and has at least one full-time employee purchase health insurance coverage through a state exchange and receive a premium tax credit or cost sharing subsidy).
  - Parent X is not subject to a Penalty One under the employer mandate.
  - Subsidiary Y failed to offer coverage to more than 5% of its full-time employees, but it did not fail to offer coverage to more than 5 of its full-time employees, so Subsidiary Y is not subject to a Penalty One. *(Rule provides grace number of 5% or, if greater, 5.)*
Employer does not Offer Minimum Essential Coverage to at least 95% of Full-time Employees

• Eligibility for Premium Tax Credit--2013 Federal Poverty Levels:
  - $11,490 for Single person. (400% = $45,960)
  - $15,510 for Couple. (400% = $62,040)
  - $19,530 for Family of 3. (400% = $78,120)
  - $23,550 for Family of 4. (400% = $94,200)
Penalty Two (Pay and Play)

Employer Offers Minimum Essential Coverage to Full-time Employees BUT

• The coverage is not affordable or does not provide minimum value (or employee is part of up to 5% (or, if greater, 5) of its full-time employees not offered coverage), and

• Employee opts out and (i) purchases health insurance coverage through a state exchange and (ii) is entitled to a premium tax credit or cost sharing subsidy.
Penalty Two (Pay and Play)

Employer Offers Minimum Essential Coverage to Full-time Employees BUT

The coverage is **not affordable** or does **not** provide minimum value.

- **Not Affordable**: Self-only coverage costs employee more than 9.5% of “household income” (i.e., income of employee plus spouse plus dependents).
  - But IRS has proposed safe harbors that would allow employer to use 9.5% of employee’s W-2 Box 1 wages or 9.5% of employee’s monthly pay rate.
  - Note: Recent IRS proposed regulations addressing wellness programs provide that (with a 2014 plan year exception for certain wellness programs in effect on May 3, 2013) affordability is determined by assuming each employee fails the requirements of any wellness program, except a wellness program related to tobacco use.
Penalty Two (Pay and Play)

Employer Offers Minimum Essential Coverage to Full-time Employees **BUT**

The coverage is **not** affordable or **does not provide minimum value.**

- **Not Minimum Value:** If “plan’s share of the total allowed costs of benefits provided under the plan is less than 60 percent of such costs.”
  
  ✓ An employer-sponsored plan will be permitted to add to the plan’s “value” the employer contributions to a Health Savings Account (“HSA”) and amounts made available under certain Health Reimbursement Accounts (“HRAs”).
  
  ✓ A plan’s share of costs for Minimum Value purposes is determined without regard to reduced cost-sharing available under a wellness program, except a wellness program related to tobacco use.
Penalty Two *(Pay and Play)*

Employer Offers Minimum Essential Coverage to Full-time Employees **BUT**

The coverage is **not** affordable or does **not** provide minimum value.

- Penalty is equal to the *lesser* of
  
  (i) $250/month (i.e., $3,000 per year) x the number of full-time employees who purchase health insurance coverage through a state exchange and are entitled to a premium tax credit or cost sharing subsidy, or
  
  (ii) The amount of **Penalty One** ($166.67/month (i.e., $2,000 per year) x number of full-time employees greater than 30).

- Again, penalty is calculated monthly but then total cumulative penalty for the year is paid by employer annually. (And $3,000 amount will be adjusted for inflation for years after 2014.)
Full-time Employees
How does Employer Determine who is a Full-time Employee for Penalty Purposes?

• Full-time employee status is measured on a real-time monthly basis, with average of 30 hours or more a week (130 hours a month) = full-time.
  ➢ May be a problem for employer whose employees’ hours fluctuate month-to-month.

• Alternatively, the IRS has issued guidance providing safe harbors providing for look-back measurement periods for determining when an employee is full-time for purposes of the employer mandate penalties.
Full-time Employee Safe Harbors

- **For an “ongoing employee”:**
  - Employer may determine employee’s full-time status by looking back at a **standard measurement period** of not less than 3 or more than 12 consecutive months.
    - Note that an “ongoing employee” is an employee who has been employed for at least one standard measurement period.
  - Employee determined to be full-time during measurement period is treated as full-time during later **stability period.**
    - Stability period in this case is at least 6 consecutive calendar months and no shorter than the standard measurement period.
  - Employee determined not to be full-time during measurement period is treated as not full-time during later **stability period.**
    - Stability period in this case is no longer than the standard measurement period.
  - Employer may have an intervening administrative period of up to 90 days that begins immediately after the standard measurement period and ends immediately before the associated stability period.
• **Transition rule for 2014**: Solely for purposes of stability periods beginning in 2014, an employer may use a measurement period that is shorter than 12 months, but no less than 6 months long, and that begins no later than July 1, 2013 and ends no earlier than 90 days before the first day of the plan year beginning on or after January 1, 2014.

  E.g., an employer with a calendar year plan could for 2014 use a measurement period of from April 15, 2013 through October 14, 2013 (6 months), with an administrative period ending on December 31, 2013, and a stability period of January 1, 2014 through December 31, 2014.
Full-time Employee Safe Harbors

- For an ongoing employee, subject to the preceding rules governing the length of the measurement period and stability period, an employer may use measurement periods and stability periods that differ in length, or in their starting and ending dates, for the following categories of employees:
  (i) Salaried and hourly employees;
  (ii) Employees whose primary places of employment are in different states;
  (iii) Collectively bargained employees and non-collectively bargained employees; and
  (iv) Collectively bargained employees subject to different collective bargaining agreements.
Example: Ongoing Employee.


**Employee 1.** Employee 1 averages 32 hours per week from Oct. 15, 2012 through Oct. 14, 2013 (the standard measurement period).

  ✓ Company must offer coverage to Employee 1 and enroll Employee 1 (effective Jan. 1, 2014) in its group health plan during the Oct. 15, 2013 through Dec. 31, 2013 administrative period.

  ✓ If coverage is elected, Company must cover Employee 1 under its group health plan from Jan. 1, 2014 through Dec. 31, 2014 (the stability period), regardless of the number of hours Employee 1 actually works in 2014.

**Employee 2.** Employee 2 averages 28 hours per week from Oct. 15, 2012 through October 14, 2013 (the standard measurement period).

  ✓ Employee 2 is not treated as a full-time employee from Jan. 1, 2014 through Dec. 31, 2014 (the stability period), regardless of the number of hours Employee 2 actually works in 2014.
For a new employee reasonably expected at start date to work full-time (on avg. at least 30 hours a week), coverage is not required until end of 90-day waiting period.
For a new employee

(i) for which it cannot be determined at start date that employee is reasonably expected to work full-time (a “variable hour employee”), or

(ii) who is a “seasonal employee,”

employer may determine employee’s full-time status using an “initial measurement period” of not less than 3 or more than 12 months.

✓ Initial measurement period begins on any date between employee’s start date and first day of the first calendar month following employee’s start date.
**Full-time Employee Safe Harbors**

- **For a new employee who is a variable hour employee or a seasonal employee:**
  - Employee determined to be full-time during initial measurement period is treated as full-time during later “stability period.”
    - Stability period in this case again is at least 6 consecutive calendar months and no shorter than the initial measurement period and **must be same length as the stability period for ongoing employees.**
  - Employee determined not to be full-time during initial measurement period is treated as not full-time during later stability period.
    - Stability period in this case is not more than 1 month longer than the initial measurement period.
  - Employer also may provide for an intervening administrative period.
    - Administrative period may not exceed 90 days.
      - Includes all periods between the employee’s hire date and the employee’s eligibility date other than the initial measurement period.
    - Combined initial measurement period and administrative period may not extend beyond last day of the first calendar month beginning on or after 1-year anniversary of the employee’s start date.
Example: New Variable Hour Employee.

Facts:

• Company is a large employer and uses a 12-month initial measurement period, which commences on the new variable hour employee’s date of hire.

• Company uses an initial administrative period that runs from the first day immediately following the last day of the initial measurement period to the end of the first calendar month that begins on or after the last day of the initial measurement period.

• Company uses an initial 12-month stability period commencing on the first day of the month following the end of the administrative period.
Employee 3.

- Employee 3 is hired on Mar. 16, 2014, and is a variable hour employee.
- Employee 3 works an average of 35 hours per week from Mar. 16, 2014 through Mar. 15, 2015 (employee’s initial measurement period).
- Company must offer coverage to Employee 1 and enroll Employee 1 (effective May 1, 2015) in its group health plan during the Mar. 16, 2013 through Apr. 30, 2015 administrative period.
- If coverage is elected, Company must cover Employee 3 under its group health plan from May 1, 2015 through April 30, 2016 (the initial stability period), regardless of the number of hours Employee 3 actually works during the period.
- Employee 3’s hours also must be measured during the Company’s standard measurement period for ongoing employees (Oct. 15, 2014 through Oct. 14, 2015). If Employee 3 averages less than 30 hours per week during the standard measurement period, Company does not have to offer Employee 3 coverage after Apr. 30, 2016, for the period of May 1, 2016 through Dec. 31, 2016 (the remaining stability period for ongoing employees).
- Company must reevaluate Employee 3’s hours during the ongoing employee standard measurement period (Oct. 15, 2015 through Oct. 14, 2016) to determine if Employee 3 is a full-time employee who must be offered coverage for the next ongoing employee stability period commencing Jan. 1, 2017.
Change in Employment Status

• If an employee’s status as a new variable hour employee or a new seasonal employee materially changes before the end of the initial measurement period so that the employee is reasonably expected to be employed an average of at least 30 hours a week (e.g., as the result of a promotion), the employer is required to treat the employee as a full-time employee upon the earlier of the following:

  (i) The first day of the 4th month following the change in employment status, or

  (ii) If the employee averages more than 30 hours a week during the initial measurement period, the first day of the first month following the end of the initial measurement period.
For purposes of determining full-time employee status for employees using the safe harbors:

• An employee who is rehired after a period during which he or she is not credited with service may be treated as a new employee upon rehire if the employee did not have an hour of service for a period of at least 26 consecutive weeks immediately preceding the rehire.

• In addition, if chosen by an employer, an employee who is rehired after a period of at least 4 consecutive weeks that exceeds the number of weeks of the employee’s period of employment immediately preceding the rehire, will be treated as new employee upon rehire.

* Note that an anti-abuse rule applies that will disregard any hour of service credited for the purpose of avoiding or undermining these employee rehire rules.
If rehired employee is not treated as a new employee pursuant to the preceding slide, then look-back measurement period is applied as follows:

- Employer determines the employee’s average hours of service for a measurement period by computing the average after excluding any special unpaid leave period (i.e., unpaid FMLA, USERRA or jury duty leave) and using that average as the average for the entire measurement period.

- Alternatively, employer may determine the employee’s average hours of service by treating the employee as credited with hours of service for any special unpaid leave period during the measurement period at a rate equal to the average weekly rate at which the employee was credited with hours of service during the weeks in the measurement period that are not part of a special unpaid leave period.

* Note that special rules also apply to employment break periods of employees of educational organizations.
Full-time Employee Anti-abuse Rules

- The IRS is aware of various structures being considered under which employers might use temporary staffing agencies to evade application of the employer mandate, such as the following:
  - Employer would purport to employ an individual for 20 hours a week and then to hire him or her through a temporary staffing agency for another 20 hours a week.
  - One temporary staffing agency would purport to employ an individual and supply him or her as a worker to a client for 20 hours a week, while a 2nd temporary staffing agency would purport to employ the same individual and supply him or her as a worker to the same client for another 20 hours a week.

- It is anticipated that the final IRS regulations issued will contain an anti-abuse rule to address situations like those described above.
Whistleblower Protection for Employees

- The ACA includes “whistleblower” provisions enforced by the Occupational Health & Safety Administration ("OSHA"), protecting employees from retaliation for certain ACA-related activities, including
  - receiving a tax credit or cost-sharing subsidy from a state exchange,
  - reporting a violation of Title I of the ACA (e.g., prohibitions on annual or lifetime limitations and coverage of preventive services), and
  - refusing to participate in an activity that the employee reasonably believes to be a violation of Title I of the ACA.
- Interim OSHA regulations provide that an employee must demonstrate, by a preponderance of the evidence, that the protected activity was a contributing factor in the alleged adverse employer action, while the employer must show, by clear and convincing evidence, that the employer would have taken the same action in the absence of the protected activity.
Whistleblower Protection for Employees

• An employee must file a complaint with OSHA within 180 days after the alleged retaliation.

• After OSHA issues (within 60 days) its findings and order, either party may appeal and request a full hearing before a DOL administrative law judge.

  ➢ *If OSHA finds the evidence supports the retaliation claim, OSHA’s order may require the employer to reinstate the employee, pay back pay, restore benefits, and provide other relief to make the employee whole.*

• OSHA’s findings and order will become final unless they are appealed within 30 days.

• If OSHA does not issue a final order within 210 days after the date an employee files a complaint, the employee may file a complaint in federal district court.
Alternative Compliance Strategies
Alternative Compliance Strategies

• Note that nothing in the *Employer (Pay or Play) Mandate* requires employers to offer employees health insurance.

• *But* the mandate rules provide penalties and incentives to encourage employers to offer full-time employees affordable health insurance coverage.

• The Congressional Budget Office has projected $117 billion in revenues in employer penalties for the period of 2012-2022.
Strategy 1

*Do not offer minimum essential coverage, and pay $2,000 penalty for all full-time employees greater than 30.*
Strat. 1: No coverage; pay $2,000 penalty

- May be most cost-effective for employer.
- Would push employees to purchase health insurance coverage from state insurance exchanges (perhaps at better net rate--after premium tax credit and cost sharing subsidy--for some employees than employer could offer).
Strat. 1: No coverage; pay $2,000 penalty

May be most cost-effective for employer.

• Employer will pay $166.67/month (i.e., $2,000 per year) penalty.
  ➢ For each full-time employee in excess of 30 full-time employees.

• But employer will avoid paying cost of health insurance coverage--and administrative costs.

• Penalty only applies to full-time (30 or more hrs./week) employees.
  ➢ Leverage use of part-time employees to further avoid cost?
Strat. 1: No coverage; pay $2,000 penalty

What will competitors do?

• Will other employers (particularly of low-paid workforce) offer no coverage and pay $166.67/month (i.e., $2,000 per year) penalty?

• Or will providing no coverage place employer at a competitive hiring/retention disadvantage?
Strategy 2

Offer minimum essential coverage and take courses of action to minimize costs of coverage.
Strat. 2: Offer minimum essential coverage

Minimizing Costs--affordable and minimum value

• Affordable.
  ➢ Self-only coverage must cost employee no more than 9.5% of household income.

• Minimum value.
  ➢ Plan’s share of the “total allowed costs of benefits provided under the plan” must equal or exceed 60% of such costs. (Basically, an actuarial value determination.)
**Strat. 2: Offer minimum essential coverage**

*Minimizing Costs--affordable and minimum value*

- **Affordable:**
  - Statute refers to 9.5% of employee household income, i.e., income of employee plus spouse plus dependents.
  - *How will employer determine employee’s household income?*
  - IRS has proposed safe harbors that would allow employer to use 9.5% of (i) employee’s current year W-2 Box 1 wages, (ii) employee’s current rate of pay, or (iii) the single individual monthly federal poverty line.
  - *Use of any of the safe harbors is optional for an employer, and an employer may apply the safe harbors for any reasonable category of employees, on a uniform and consistent basis for all employees in a category.*
**Strat. 2: Offer minimum essential coverage**

*Minimizing Costs—affordable and minimum value*

- **Affordability Safe Harbors:**
  - *(i)* **Form W-2 Safe Harbor:**
    - If the employee’s required contribution for the calendar year does not exceed 9.5% of the employee’s W-2 Box 1 wages for the year.
    - Employee’s required contribution must be a consistent amount or percentage of W-2 Box 1 wages for the year.
    - **Example:** Full-time Employee A’s W-2 Box 1 wages are $18,000.
      - $18,000 x 9.5% = $1,710. $1,710/12 = $142.50/mo.
      - Employee A’s share of premium per month must be $142.50/month or less to be affordable (and to avoid potential $250/month ($3,000/year) Pay and Play penalty).
Strat. 2: Offer minimum essential coverage

Minimizing Costs--affordable and minimum value

- Affordability Safe Harbors:
  
  (ii) **Rate of Pay Safe Harbor:**
  
  - If the employee’s required contribution for the calendar month does not exceed (a) for an hourly employee, 9.5% of an amount equal to 130 hours x the employee’s hourly rate of pay as of the first day of the coverage period, and (b) for a salaried employee, 9.5% of the employee’s monthly salary.
  
  - An employer may use this safe harbor only to extent it does not reduce the hourly wage of hourly employees or the monthly wages of salaried employees during the calendar year.

  (iii) **Federal Poverty Line Safe Harbor:**
  
  - If the employee’s required contribution for the calendar month does not exceed 9.5% of the federal poverty line for a single individual for the applicable calendar year ($11,490 for 2013), divided by 12.
  
  ✓  $11,490 x 9.5% = $1,091.55 ÷ 12 = $90.96/month.
Strat. 2: Offer minimum essential coverage

Minimizing Costs--affordable and minimum value

• Minimum Value:
  - Plan’s share of costs of benefits provided under the plan must equal at least 60% of such costs. (Actuarial determination.)
  - An employer-sponsored plan will be permitted to add to the plan’s “value” the employer contributions to a Health Savings Account (“HSA”) and amounts made available under certain Health Reimbursement Accounts (“HRAs”).
Strat. 2: Offer minimum essential coverage

Minimizing Costs--affordable and minimum value

- Minimum Value:
  - HHS final regulations issued on February 25, 2013, provide 3 potential approaches to determine minimum value:
    1. Minimum Value Calculator.
    2. Design-based Safe Harbor Checklists.
    3. Certification by Certified Actuary.
Strat. 2: Offer minimum essential coverage

Minimizing Costs--affordable and minimum value

• **Minimum Value**: (1) MV Calculator.
  - 4 core categories of benefits and services: *(i) Physician and mid-level practitioner care; (ii) Hospital and emergency room services; (iii) Pharmacy benefits; and (iv) Laboratory and imaging services.*
  - Benefits and services beyond these 4 categories of benefits generally have only limited impact on the plan’s actuarial value.
    - E.g., a plan that does not include coverage for rehabilitative services, durable medical equipment, acupuncture and chiropractic services, and home health services may have an actuarial value of only 5% less than a plan that includes coverage for such services.
Alternative Compliance Strategies

Strat. 2: Offer minimum essential coverage

Minimizing Costs--affordable and minimum value

• Minimum Value: (1) MV Calculator.
  - Calculator would be used to make minimum value
determinations by plans that have standard cost-sharing features.
  - Plan would input limited set of information on the plan
benefits offered and specified cost-saving features
(e.g., deductibles, co-insurance, and maximum out-of-pocket costs) for essential health benefits.
  - Calculator also would take into account employer
contributions to an HSA or amounts made available
under certain HRAs, if applicable.
Strat. 2: Offer minimum essential coverage

Minimizing Costs--affordable and minimum value

- **Minimum Value**: (2) Design-based Safe Harbor Checklists.
  - Safe harbor checklists to be issued by the IRS will allow a plan to compare the plan’s coverage to the checklists’ coverage.
  - A plan would be treated as providing minimum value if its cost-sharing attributes are at least as generous as any of the safe harbor checklist options.
Strat. 2: Offer minimum essential coverage

Minimizing Costs—affordable and minimum value

• Minimum Value: (3) Actuarial Certification.
  ➢ Would accommodate plans with nonstandard features, such as quantitative limits on essential health benefits.
  ✓ Plan would generate an initial value using a calculator and then engage a certified actuary to make adjustments that take into account nonstandard features.
  ✓ Alternatively, plan would engage a certified actuary to determine the plan’s actuarial value without use of a calculator.
Strat. 2: Offer minimum essential coverage

Minimizing Costs--affordable and minimum value

- Additional considerations in setting premiums:
  - Will employees not offered affordable coverage with minimum value actually go to state exchange to obtain coverage?
  - Are employees eligible for subsidy under state exchange? (Are they instead Medicaid eligible?)
  - What will it cost employer to provide affordable coverage with minimum value vs. risk of Pay and Play $3,000 penalty?
**Strat. 2: Offer minimum essential coverage**

*Minimizing Costs--affordable and minimum value*

- **Example 1 (assuming minimum value):**
  - *Employer has 300 employees: 100 part-time; 200 full-time.*
  - Of employer’s 200 full-time employees: 100 paid $20,000/year; 50 paid $30,000/year; 50 paid $40,000/year.
    - $20,000 x 9.5% = $1,900. $1,900/12 = $158.33/mo.
    - $30,000 x 9.5% = $2,850. $2,850/12 = $237.50/mo.
    - $40,000 x 9.5% = $3,800. $3,800/12 = $316.66/mo.
Strat. 2: Offer minimum essential coverage

Minimizing Costs—affordable and minimum value

• Example 1 (cont’d):
  ➢ Employer charges $237.50/month for minimum essential coverage (i.e., 9.5% of $30,000/12):
    ✓ Maximum annual penalty if all 100 employees paid $20,000/year obtain coverage on state exchange: 100 x $3,000 = $300,000.
    ✓ If only 50 employees paid $20,000/year obtain coverage on state exchange, penalty is 50 x $3,000 = $150,000.
    ✓ If employer scraps coverage and just pays Pay or Play $2,000 penalty, penalty is [200 – 30] x $ 2,000 = $340,000.
Strat. 2: Offer minimum essential coverage

Minimizing Costs--affordable and minimum value

• Example 2--*Same facts as Example 1* (assuming minimum value):
  
  - Employer has 300 employees: 100 part-time; 200 full-time.
  
  - Of employer’s 200 full-time employees: 100 paid $20,000/year; 50 paid $30,000/year; 50 paid $40,000/year.

  ✓ $20,000 x 9.5% = $1,900. $1,900/12 = $158.33/mo.
  
  ✓ $30,000 x 9.5% = $2,850. $2,850/12 = $237.50/mo.
  
  ✓ $40,000 x 9.5% = $3,800. $3,800/12 = $316.66/mo.
Strat. 2: Offer minimum essential coverage

Minimizing Costs—affordable and minimum value

• **Example 2 (cont’d):**

  - Employer charges $158.33/month for minimum essential coverage (i.e., 9.5% of $20,000/12) for employees making $20,000/year; charges $237.50/month for employees making $30,000/year; and charges $316.66/month for employees making $40,000/year:
    - No penalty even if one or more employees obtain coverage on state exchange. (Any such employee will not be eligible for a premium tax credit.)
    - Employees making $30,000/year or $40,000/year may be unhappy that they are paying higher health insurance premiums than lower-paid employees.
Strat. 2: Offer minimum essential coverage

Minimizing Costs—part-time employees; waiting period

• Maximize use of part-time (averaging less than 30 hours a week (less than 130 hours a month)) employees.
  ➢ Is this a practical solution?
  ➢ How will such a strategy impact employee morale/retention?
  ➢ Will there be adverse customer relations impact from such strategy (e.g., Darden)?
  ➢ Employment discrimination or ERISA Section 510 claims possible?
  ➢ Part-time employees could purchase (subsidized) coverage on state exchange.

• Use longest permissible eligibility waiting period.
  ➢ Maximum permissible eligibility waiting period is 90 days.
  ➢ Pay and Play penalty does not apply with respect to a full-time employee during his or her eligibility waiting period.
Strat. 2: Offer minimum essential coverage

Minimizing Costs—*higher premiums for higher-paid employees*

- In effect, higher-paid employees would subsidize lower-paid employees.
  - Not discriminating in favor of highly-compensated employees.
- How do you set the employee premium rate scale?
  - At what management (or other) levels will premium rates increase?
  - How many levels of premiums will there be?
  - How will strategy impact employee morale/retention?
  - Is it preferable to just set rate at uniform $ amount for all, which is over 9.5% for lowest tier of employees (risking $3,000 penalty just for them) but passes affordability test for others?
Strat. 2: Offer minimum essential coverage

Minimizing Costs—dependent coverage

• Offer dependent coverage that is not affordable.
  ➢ *Pay and Play* penalty only applies if employee’s coverage is unaffordable (although this could change).

• Charge dependent coverage based on size of family.
  ➢ An employee with three children pays more than an employee with one child.
Strat. 2: Offer minimum essential coverage

Minimizing Costs--**dependent coverage**

- Dependents still will be able to get coverage on state exchange.
  - But individual taxpayer who claims them as dependent likely will not qualify for premium tax credit because *tax credit affordability for dependents also is determined based on employee self-only coverage threshold of 9.5% of household income*.
  - However, there also will be no individual mandate penalty because *individual mandate penalty exception for no affordable coverage is based on 8% of household income and the lowest cost family coverage offered by the employer*. 
Strat. 2: Offer minimum essential coverage

Minimizing Costs—wellness programs

• Establish a wellness program whereby incentives are provided to employees in the form of lower employee premium payments for employees who engage in healthy behavior.
  ➢ Recent IRS proposed regulations generally provide, however, that affordability of an employer-sponsored plan is determined by assuming each employee fails the requirements of any wellness program, other than a wellness program related to tobacco use.

• Many employers penalize workers for unhealthy behavior, e.g., by providing for higher premiums for smokers, or higher premiums for overweight employees who do not lose weight.
  ➢ Be careful to comply with antidiscrimination law: Provide a reasonable alternative for workers with conditions resistant to treatment.
Strat. 2: Offer minimum essential coverage

Minimizing Costs—wellness programs

- Create a healthy culture at work, e.g., provide healthy snacks and healthy food in the cafeteria, and encourage exercise.
- Offer staff gym membership reimbursement, create walking clubs, have friendly competitions to encourage a healthy lifestyle for employees.
- Provide membership for employees in healthy-lifestyle programs like Weight Watchers.
- A balanced lifestyle--proper diet, exercise and leisure time (including vacation)--should lead to healthier (and more productive) employees and reduced employees’ medical utilization, which should lead to lower health insurance premiums.
- Also, a healthy (and happy and committed) staff should incur fewer sick days.
Alternative Compliance Strategies

Strat. 2: Offer minimum essential coverage

Minimizing Costs—consumer driven health plans

- Offer a high deductible plan with an HSA (i.e., health savings account) allowing employees to pay for out-of-pocket medical costs with their self-funded HSAs.

  - Employer contributions to HSAs will be taken into account for purposes of meeting the 60% minimum value threshold.
Strat. 2: Offer minimum essential coverage

Minimizing Costs--accountable care organizations

• An employer may seek to join an accountable care organization (“ACO”), which is a network of health care organizations, hospitals and doctors that unite to provide coordinated medical care to patients.
  ➢ Intent is to integrate, coordinate and be held accountable for an individual’s health care, thus generating better medical outcomes at lower cost.

• A Micro Market Network operates similar to an ACO, but is not quite as integrated.
Strat. 2: Offer minimum essential coverage

Minimizing Costs—accountable care organizations

• The health plan contracts with doctors and hospitals through an ACO. The providers in the ACO are responsible for managing the care of the health plan enrollees and are financially rewarded for reduced costs.

➢ E.g., by (i) avoiding excessive care in the way of a treatment or procedure, or more expensive hospital, that is not necessarily better, or (ii) working to ensure that patients manage their conditions by taking their medications properly and returning for needed appointments.
Strat. 2: Offer minimum essential coverage

Minimizing Costs—private exchanges

- Large employers are not allowed to participate in the state exchanges until 2017. In the interim, a large employer may consider private exchanges.
  - Various consultants are assisting companies with private exchanges.
Strat. 2: Offer minimum essential coverage

*Minimizing Costs—private exchanges*

- A private exchange contracts group-specific rates with participating insurers. Employers provide their employees with money to purchase coverage under the exchange.
  - The employee picks a coverage level and insurance from the available providers, based on his or her health needs, the employer contribution, and risk tolerance.
  - As employees shop exchanges, competition for their business by insurers presumably would help keep health insurance costs down.
  - Use of private exchanges would lessen employer’s administrative burden.
  - Will a private exchange qualify as employer-sponsored coverage?
Strat. 2: Offer minimum essential coverage

Minimizing Costs—professional employer organizations (“PEOs”)

- PEOs can provide small to medium-sized employers an array of employee benefit programs and handle payroll matters.
- PEOs can take advantage of economies of scale to obtain lower health insurance costs.
  - By pooling employees of different employers in different industries and geographic areas, a PEO offers insurers a broad employee base, which can lead to better coverage selections with lower premiums.
Reporting Requirements
To IRS

• Beginning for 2014, each employer (large and small) who provides minimum essential coverage to an individual during a calendar year must submit the following information to the IRS (by a date to be prescribed by the IRS):
  ➢ Name, address and EIN of the employer maintaining the plan;
  ➢ Portion of the premium paid by the employer;
  ➢ Name, address and SSN of the primary insured and the name and SSN of each other individual covered;
  ➢ Dates during which the insured(s) were covered; and
  ➢ Such other information as may be required by the IRS.
To IRS

For 2014 coverage, each large employer (50 or more full-time employees) who offers minimum essential coverage to an individual during a calendar year further must submit the following information to the IRS:

- Certification whether the employer offered its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage;
- If the employer did offer its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage,
  - Duration of any waiting period for coverage,
  - Months during the year for which coverage was available,
Reporting Requirements

To IRS

• (Cont’d for large employer):
  ✓ Monthly premium for the lowest cost option in each enrollment category under the plan, and
  ✓ Employer’s share of the total allowed costs of benefits provided under the plan;
  ➢ Number of full-time employees for each month of the year;
  ➢ Name, address and SSN of each full-time employee and months (if any) during which he or she was covered under the plan; and
  ➢ Such other information as may be required by the IRS.
Reporting Requirements

To Covered Individual

Beginning for 2014, each employer who provides (or offers, in the case of a large employer) minimum essential coverage to an individual during a calendar year also must furnish the following information to such individual by January 31 of the following calendar year:

- Name, address and phone number of the employer; and
- The information required to be disclosed by the employer to the IRS with respect to the individual.
Take-away Tips
1. **Determine whether your company is a large employer subject to the employer mandate.**

   - **Is your company a member of a group of companies under common control or an affiliated service group?**
     - For this purpose, entire such group is counted.
   - **Identify for each month in 2013 your full-time employees (those working 30 or more hours per week (130 hours per month) and your full-time equivalent employees (based on 120 hours per month = 1 full-time equivalent).**
     - This also is necessary if you are subject to the employer mandate and use the look-back safe harbors for determining full-time employees.
     - Also identify your seasonal workers and their period of employment.
   - **Employers with approximately 50 full-time employees and full-time equivalents may want to consider downsizing to avoid being subject to the employer mandate.**
2. Determine whether your company wants to pay or play.

- Identify your full-time employees subject to potential penalty.
  - If you have variable hour and seasonal employees, determine if you want to use the look-back safe harbors for determining full-time employees.
  - Consider restructuring workforce to more part-time employees.

- Analyze the cost of offering minimum essential coverage vs. not offering such coverage (Penalty One).

- Analyze the cost of offering minimum essential coverage that is affordable and provides minimum value, and extent to which you will offer such coverage.
  - Analyze and estimate penalties (Penalty Two) and costs of offering affordable coverage for different 9.5% employee wage level cutoffs.
  - Remember penalties apply on a company-by-company basis for a controlled group.
  - Establish and price dependent coverage.
  - Confirm that your coverage provides minimum value.
3. Be prepared--don’t delay.

- Evaluate company group health plan to determine whether it provides minimum value and to determine your cost of employee affordability.
  - Begin dialogue with your insurance broker and engage consultants and experts, as appropriate.
- Implement and focus on recordkeeping requirements--for both coverage determination and future reporting and disclosure requirements.
- Keep in mind labor relations, other benefits, and business issues when determining whether to restructure your workforce by expanding part-timers.
- Timely amend your group health plan and address open enrollment for the employees (and dependents) to whom you choose to offer coverage.
Other ACA Requirements
2012

- Provide **Summary of Benefits and Coverage ("SBC")** effective Sept. 23, 2012.
- Effective Sept. 23, 2012, notice of material modification that would affect content of SBC must be provided at least 60 days before modification is effective.
- Value of employer health coverage must be reported on W-2 for 2012 calendar year. (2013 for employers with less than 250 W-2s).
- Payment of Patient-Centered Outcome Research Institute Fee (the "Research Fee") of $1 multiplied by the average number of people covered under health insurance plan. (Fee applies for plan years ending after Sept. 30, 2012.)
2013

- Healthcare flexible spending account contributions by employees limited to $2,500.
- Research Fee of $1 x average number of people covered under health insurance plan goes up to $2.
- Medicare Part D subsidy terminates.
- Employers must provide notice of coverage options available through the state’s Health Insurance Marketplace by October 1, 2013, and at the time of hire for subsequent hires (within 14 days of start date for 2014 hires).
- Medicare payroll tax increases from 1.45% to 2.35% for individuals with wages greater than $200,000 ($250,000 for joint filers).
- Phase-in of no annual limit on essential health benefits increases to $2M (for plan years beginning on or after Sept. 23, 2012).
Quick Review of Other ACA Requirements

2014

- *Pay or play employer mandate becomes effective.*
- Individual mandate becomes effective.
- State insurance exchanges open to individuals and small employers (i.e., employers with up to 100 employees).
- No pre-existing condition exclusions for any participants.
- No annual limit on essential health benefits.
- No eligibility waiting period in excess of 90 days.
- Any plan or employer offering minimum essential coverage must file reports with the IRS regarding the individual’s coverage.
Quick Review of Other ACA Requirements

2014 cont’d

• Insured plans may not discriminate in favor of highly-compensated employees. *(Note: Regulations have placed rule on hold.)*

• Employers with more than 200 employees must automatically enroll full-time employees. *(Note: Requirement temporarily on hold.)*

• Plans in the small group market may not impose deductibles higher than $2,000 for individual coverage and $4,000 for any other coverage.

• Level of penalties/incentives for wellness programs (currently 20%) may be up to 30% of cost of coverage. *(Note: Regulations may raise to 50%).*

• Grandfathered health plans must allow adult dependent children (up to age 26) to enroll in plan if plan offers dependent coverage.

• New transitional reinsurance fee based on covered lives ($5.25 per mo./$63.00 per year). *(Fee is intended to stabilize premiums in individual market during first 3 years (2014-2016).)*
Questions
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