

Health Care Reform: The Legal Landscape (and other fun stuff)

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Steps You Should Be Taking Now in 2013

- Market Place Notice
 - Do I have to send it to COBRA beneficiaries?
 - Do I have to send to employees in the territories?
- Annual enrollment for 2014-send revised SBCs
 - Can I include the new language on a cover sheet?
 - Do I have to send on behalf of an EAP?
- Mid-October--Begin standard measurement period for 2015
- Address impact of *Windsor*
 - Do I have to cover same sex spouse's?
 - How do the new rules affect Health FSAs, HRAs, and HSAs?

2014

- 2nd wave of health insurance reforms (effective for plan years beginning on or after January 1, 2014)
 - Essential health benefits
 - Do I have to provide EHBs?
 - How do I identify EHBs?
 - Deductible limits
 - Can I use an HRA to satisfy the deductible?
 - OOP Limit
 - What is included in the OOP?
 - Are multiple network tiers considered a single network?
 - Provider nondiscrimination
 - Do I have to allow all providers to participate in my network?

2014

- Health Insurance Reforms (cont')
 - Wellness rules
 - Who is entitled to a reasonable alternative?
 - What is an activity based program?
 - Clinical trials?
 - Do I have to cover all clinical trials?
 - 90 day waiting period limitation
 - If our waiting period was longer than 90 days, and someone is still in a waiting period when the plan year in 2014 begins, do we have to cover them?
 - No pre-existing condition exclusions
 - How does this impact my certificate of creditable coverage?

Other Fun Stuff

- Technical Release 2013-03
 - Can an employer pay premiums for a major medical policy issued in the individual market?
 - Can an employee pay for major medical IM premiums through a cafeteria plan?
 - Can I still have a stand alone defined contribution arrangement?
 - What is “integrated”?

Pay or Play Overview

IRC 4980H: Overview

- Effective January 1, 2014
- 4980H applies only to *applicable large employers*
- Penalties are assessed for any month that the following occur:
 - Coverage was not “offered” to a full-time employee in accordance with 4980H OR
 - Coverage was offered but it was unaffordable and/or did not provide minimum value (as defined for purposes of 4980H) AND
 - The full-time employee received a premium subsidy in the Exchange
- Sledgehammer Penalty: Failure to offer penalty
 - $1/12$ of 2000 x Total number of full-time employees (reduced by allocable share of 30)
- Tackhammer Penalties: Failure to offer affordable/minimum value coverage
 - $1/12$ of 3000 x Total number of full-time employees who received a subsidy in the Exchange

Where 4980H fits in the ACA

- 4980H one of MANY “components” of the ACA
- Other components:
 - Health Insurance Reforms
 - PCORI Fee
 - Transitional Reinsurance
 - Exchange
 - Individual Mandate
 - Other tax provisions (e.g. 2500 limit on health FSA)

Helping Employer's Make the Right Decision

Step #1: Who is an applicable large employer?

- Only applicable large employers are subject to 4980H
- The applicable large employer determination is based on IRS controlled group rules.
- The applicable large employer determination is based on “full-time equivalency”, which includes both “full-time employees” and full-time equivalents, determined in accordance with 4980H.
- If there is no question that employer is an applicable large employer, then proceed to step #2.

Who is an Applicable Large Employer

- Any employer who averaged 50 or more full-time employees plus full-time equivalents on business days during the preceding calendar year
 - Transition rule for 2014—will it still apply in 2015?
 - ALE status determined on a controlled group basis (contrast with new rule for assessable payments)
 - An employer is an ALE if sum of (i) *full-time employees* and (ii) *full-time equivalents* each month/12 is ≥ 50
 - Only common law employees are counted (see IRS 20-factor common law employee test)
 - Issues for temporary and leased employees (common-law employer is responsible)
 - Special rule for *seasonal* employees
 - If over 50 for no more than 4 calendar months or 120 days (not necessarily consecutive) AND employees in excess of 50 during those months are *seasonal*, then employer not an ALE

Key Terms for ALE Status

- *Full-time employee*
 - Common law employee of a controlled group member who is credited, on average, with 30 or more of *hours of service* during a week in a month
 - 130 *hours of service* in a month is considered full-time
 - Count actual hours of service—safe harbor for determining FT for purposes of the tax not applicable to ALE status
 - Do not count foreign service
- *Full-time equivalent*
 - Divide total *hours of service* for employees who are NOT full-time employees (not to exceed 120 hours of service) by 120
- *Seasonal*
 - An employee who performs work on a “seasonal basis”
 - Based on labor regulations

Are you an ALE?

- NO!!!!!! Stop, you are not subject to 4980H!!!!!!
 - But other aspects of ACA still apply (health coverage mandates, etc)
- YES!!!! Then you must comply with Section 4980H
 - This doesn't mean you have to provide coverage; it simply means you have to pay the assessable penalties due under 4980H
 - The following rules help you determine the assessable penalties

Step #2: Identifying Full-time Employees

- Each member of the controlled group is independently responsible for identifying its full-time employees (as defined by 4980H) for purposes of reporting and assessment of taxes (if any)
- Full-time employee determination is based on specific hours of service rules, which includes paid leaves of absence.
- Full-time employee determination is done on a monthly basis UNLESS the employer chooses to use the safe harbor method for identifying full-time employees.
- Safe harbor method for identifying full-time employees allows employers to determine average hours over a measurement period. If the employee is full-time based on the average hours during the measurement period, that employee is a “full-time employee” during a stability period that is generally no shorter in duration than the measurement period.

Identifying full-time employees

- “Compliance” with 4980H is simply a matter of identifying the assessable payment an ALE owes (if any) by analyzing the coverage offered (or not offered) to full-time employees
 - It is not a mandate to offer coverage
 - It is not a mandate to offer coverage that is affordable and provides minimum value
- *Compliance is determined on a controlled group member by controlled group member basis!!!!!!*

Who is a full-time employee?

- Employee credited, on average, with 30 or more hours of service each week during a month
 - 130 *hours of service* in a month is considered full-time
 - Full-time equivalents not considered *full-time employee* for purposes of compliance with 4980H
- Determinations made according to specific *hours of service* rules
- Employers may (but are not required to) use safe harbor method

Who is a full-time employee? Hours of Service

- Hours of service are defined as
 - Each hour for which an employee is paid or is entitled to payment for performance of services AND
 - Each hour for which an employee is paid or is entitled to payment on account of a period for which no services were performed due to the following (i.e. Paid Leave):
 - Vacation
 - Holiday
 - Illness
 - Incapacity
 - Layoff,
 - Jury duty
 - Military duty
 - Leave
 - No limit on the amount of paid leave that must be taken into account

Who is a full-time employee? Hours of Service

- Hours of service performed outside of the United States are NOT counted
- Special rules for educational institutions
 - See Safe Harbor Rules
- Special rules for “Special” unpaid leave if using safe harbor
 - FMLA
 - USERRA
- Hours of service performed for one ALE member treated as performed by any other ALE member for whom the employee provides services during the year

Who is a full-time employee? Hours of Service

- Hourly Employees—based on records of actual hours of service
- Non-Hourly
 - Actual hours
 - Days equivalency
 - Weeks equivalency
 - Cannot use the equivalency method if it operates to substantially understate the hours of service (e.g. nurse that works 3, 12 hour shifts per week)
 - May use different methods for different classifications of non-hourly

Who is a full-time employee? Difficult Employees

- Hours of service for commission employees, adjunct faculty, transportation employees, and similar positions
 - Any reasonable method may be used (until further guidance is issued)
 - Method must be consistent with 4980H
- Interesting applications:
 - Short term employment of less than 3 months
 - Temporary employees

Who is a full-time employee?

- Safe harbor vs “Other”
- Other is “month to month”
 - What are the ramifications of a month to month calculation?
- Safe harbor looks at hours over preceding measurement period
 - Can you use for some but not all employees?

Who is a full-time employee?

Safe Harbor-Key Concepts and Terms

- Safe harbor utilizes a look back period (“measurement period”) and a look forward period (“stability period”) for identifying full-time employees
- Safe Harbor for New Employees
 - *Initial Measurement Period (IMP)* with subsequent stability period
 - Non-Variable vs. Variable/Seasonal
- Safe Harbor for Ongoing Employees
 - *Standard Measurement Period (SMP)* with subsequent stability period
- Administrative periods between measurement period and stability period allowed-subject to limits
- Safe Harbor not required !!!!

Who is a full-time employee? Safe Harbor-New Employees

- New Employee—employee who has not been employed as a common law employee for one standard measurement period (the measurement period for ongoing employees)
- Types of New Employees
 - New, non-variable
 - Safe harbor not applicable
 - Offer of coverage that is effective within 3 months
 - New, variable/seasonal
 - Safe harbor applicable

Who is a full-time employee?

Safe Harbor-New Variable/Seasonal Employees

- Initial Measurement Period
 - 3-12 month period (but see impact of administrative rules)
 - Begins on any date between start date (date first credited with an hour of service) and first day of the first calendar month following employee's start date
 - If start of IMP delayed, delay counted towards the administrative period
 - Change in employment status to Non-variable during IMP: Required to be treated as full-time on earlier of 1st day of fourth month following change in status or start of applicability period

Who is a full-time employee?

Safe Harbor-New Variable/Seasonal Employees

- Stability Period following Initial Measurement Period
 - Generally
 - Must be at least 6 months
 - Same length as stability period for ongoing employees
 - Employees determined *to be full-time* during the IMP
 - No shorter in duration than the IMP (basically must be same length as measurement period or 6 months, whichever is longer)
 - Employees determined *NOT to be full-time* during IMP
 - Stability period not more than 1 month longer than the IMP
 - Cannot exceed the remainder of the standard measurement period (for ongoing employees)

Who is a full-time employee?

Safe Harbor-New Variable/Seasonal Employees

- Special rules for Stability Period following IMP:
 - Stability period following the IMP will overlap with the standard measurement period and stability period following standard measurement period will control if determined to be full-time
 - Change in employment status during stability period for continuing employee will NOT affect status during stability period

Who is a full-time employee?

Safe Harbor-New Variable/Seasonal Employees

- Administrative period
 - No more than 90 days
 - Any period preceding the start date of the IMP is counted towards 90 days
 - Coverage must be offered no later than end of the 1st month beginning on or after the anniversary of the employee's start date

Who is a full-time employee? Safe Harbor-Ongoing Employees

- Standard Measurement Period (SMP)
 - 3-12 months (IMP and SMP must be same duration)
 - Transition rule for stability periods starting in SMP is static
- Stability Period following SMP
 - If employee determined to be full-time
 - Stability must be at least 6 months but no shorter in duration than the SMP
 - If employee determined NOT to be full-time
 - Stability period no shorter in duration than SMP

Who is a full-time employee? Safe Harbor-Ongoing Employees

- Special rules for Stability Period following SMP:
 - Employers may change from year to year but not after it has started
 - Change in employment status during stability period for continuing employee will NOT affect status during stability period

Who is a full-time employee? Safe Harbor

- Variations in measurement/stability/administrative periods permitted:
 - Each group of employees subject to a different CBA
 - Union and non-union
 - Salaried and hourly
 - Place of employment
- May vary by ALE member

Counting Hours of Service Using Pay Periods

- Standard Measurement Period may now utilize pay periods to determine hours of service using 2 options:
 - Option 1: exclude the entire payroll period that includes the beginning of the year and include the entire payroll period that includes the end of the measurement period, or
 - Option 2: Include the entire payroll period that includes the beginning of the year and exclude the entire payroll period that includes the end of the measurement period
- Practice Pointer
 - The payroll period options above apply only to ongoing employees

Breaks in Service

- An employee who takes an unpaid leave or terminates employment and then resumes services as a new employee and a new initial measurement period may apply if:
 - The period for which no hours of service are credited is at least 26 weeks; or
 - The period with no credited hours of service (of less than 26 weeks) is at least four weeks long and is longer than the employee's period of employment immediately before the break in service
- If the prior service cannot be disregarded (*i.e.*, the employee cannot be treated as a new hire) as described above, the measurement and stability period that would have applied to the employee had the employee not experienced the break in service will continue to apply upon resumption of service.

Special Leaves of Absence/Employment Break

- Special unpaid leaves of absence include leaves subject to FMLA, USERRA and jury duty leaves
- Employment Break for educational organizations (limit to 501 hours of service)
- When calculating average hours worked for a measurement period that includes a special leave of absence/employment break, employers have 2 options:
 - Option 1: disregard the weeks of unpaid special leave and average the remaining weeks, or
 - Option 2: credit employees with hours of service for special unpaid leave at the 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 special unpaid leave

Special Issues under Safe Harbor

- What happens if employee takes personal leave of absence during stability period?
- How does safe harbor coordinate with 2708 waiting period rules?
 - Existing employees who move into an “eligible” position
 - Employees who transfer among controlled group members
 - Rehired employees who are “continuous” employees under break in service rules

Step 4: Is employer subject to excise taxes?

- Determine whether applicable large employer member offers coverage through an eligible employer sponsored plan to all but 5% of its full-time employees. If it does, then the applicable large employer member is not liable for the Sledgehammer Tax (but may be liable for the Tackhammer Tax).
- Determine whether any coverage option through an eligible employer sponsored plan that also provides minimum value is “affordable”. 4980H rules provide three different safe harbor methods for making the affordability determination.
- Determine whether the coverage offered provides minimum value. A plan provides minimum value if it pays for 60% of the “allowed costs”, which are based on essential health benefits.

Calculating excise taxes

- Calculation of penalty
 - Is determined separately for each member of the controlled group [“applicable large employer member”]
 - Proposed regulations have rules for allocating the 30 disregarded employees
 - CALCULATED MONTHLY!!!!!!
 - If you don’t offer minimum value coverage that is affordable to 100% of your full-time employees each month, you will likely be subject to an excise tax if 1 full-time employee receives a subsidy—the reason that they receive the subsidy (wasn’t offered coverage or wasn’t offered the right coverage isn’t relevant)

Controlled Group Rules -- Example

- Parent Co A has 1,000 employees. A has a wholly owned subsidiary, S, with 40 employees. The entire controlled group consisting of A and S is an applicable large employer. A offers MEC to all full-time employees and dependents. S does not offer coverage. A full-time employee of S obtains a subsidy on an Exchange. The No Coverage Penalty applies to S, based only on the full-time employees of S.

Assessment of Penalties- Sledgehammer Penalty

- No Sledgehammer Penalty if *MEC* coverage is offered to substantially all of the ALE member's full-time employees
- Offer
 - Must extend to children under age 26 BUT NOT SPOUSES
 - Effective opportunity to enroll (or decline to enroll) no less than 1 time per plan year
 - 125 election rules not impacted
 - Special enrollment rules not impacted
 - Partial Calendar Month Rule: Generally must offer coverage for whole month
 - Special rule for mid-month terminations
 - COBRA premium payment rules apply
 - Grace period
 - Insignificant shortfall Rule

Assessment of Penalties- Sledgehammer Penalty

- Substantially all:
 - No sledgehammer penalty for ALE member if MEC offered to at least 95% of all of ALE member's full-time employees (and their dependents)
 - You may intentionally carve out 5%
 - Still subject to Tackhammer Penalty if any one of the 5% enrolls in exchange and receives a subsidy
- Sledgehammer applied ONLY to ALE's full-time employees
 - 30 full-time employee reduction applies, but on a proportional basis based on ALE members ratable share

Assessment of Penalties- Tackhammer Penalty

- No tackhammer if MEC that is *affordable* and provides *minimum value* is offered (or none of the 5% excluded enrolled in the exchange and received a subsidy)
- Same offer rules apply
- No additional guidance on *minimum value*

Minimum Value

- Minimum value (MV) is satisfied if:
 - The plan must pay 60% of the “allowed costs”
 - What are “allowed costs”?
 - Based on EHB
- 3 ways to determine if plan provides minimum value—
 - Minimum value calculator
 - Array of design-based safe harbors provided by the IRS, or
 - Appropriate certification by an actuary that the plan provides minimum value
- HRA and HSA contributions may be taken into account in determining MV

Assessment of Penalties- Tackhammer Penalty

- Affordability Rules
 - Based on self-only premium for lowest cost option that provides minimum value
 - Safe harbor for determining affordability
 - W-2 wages
 - Wages does NOT include pre-tax salary reductions
 - Adjustments for partial year offer of coverage
 - Premium must remain a constant amount or percentage of W-2
 - Rate of Pay Safe Harbor
 - Hourly rate of pay X 130 (for hourly employees)
 - Monthly rate of pay (for salaried employees)
 - This appears to be based on GROSS pay
 - Federal Poverty Safe Harbor
 - Federal poverty limit for single individual (based on most recent published report at start of plan year)/ 12

Transition Relief—Still available?

Transition Relief – Fiscal Year Plans

- Fiscal year plans can comply as of first day of 2014 fiscal plan year for employees who meet eligibility rules in effect on 12/27/2014
 - Must apply the eligibility rules in effect on December 27, 2012 (the day before issuance of the proposed regulations)
 - If terms of eligibility changed, then transition relief only available to “other employees” if coverage/eligibility requirements satisfied
 - Code § 6056 reporting requirements still apply as of 1/1/2014

Transition Relief – Cafeteria Plans

- Cafeteria plan coverage changes allowed to revoke and add coverage during 2013-2014 fiscal year
- Employer is allowed to amend its cafeteria plan to permit either or both of the following changes:
 - Employees who elected salary reduction for health coverage with a fiscal plan year beginning in 2013 may revoke or change their election with respect to health coverage once during that plan year without regard to whether the employee experienced a change in status, and
 - Employees who failed to elect salary reduction for health coverage with a fiscal plan year beginning in 2013 may make a prospective salary reduction election for health coverage on or after the start of the 2013 fiscal plan year without regard to whether the employee experienced a change in status
- Plan must be amended no later than December 31, 2014

Employer Reporting

- 6055 MEC reporting: a report with the IRS that includes the following information:
 - Whether you offer MEC
 - The name, address and SSN of EVERY INDIVIDUAL COVERED BY YOUR MEC.
 - The dates such individuals were covered by your MEC
- You are also required to send a report to EACH INDIVIDUAL LISTED ON THE FORM YOU SEND TO THE IRS.

Employer Reporting

- 6056 Reporting: A report with IRS that includes the following information:
 - Name/EIN of employer.
 - Certification that we provide MEC to full-time employees AND dependents
 - Duration of waiting period for full-time employees
 - Months when coverage was available to full-time employees and dependents
 - Name, SSN for each full-time employee and their dependents and the months that they were covered
 - Monthly premium for lowest cost option
- Much like the 6055 report, you also have to send report with same information to full-time employees

Step #4: Determining whether to “pay” or “play”

- Determine whether employer is liable for Sledgehammer Tax based on current terms of eligibility.
- If employer is potentially liable for Sledgehammer Tax, identify costs to avoid Sledgehammer Tax (i.e. how much will it cost to offer coverage to at least 95% of the employer’s full-time employees versus paying the Sledgehammer Tax)
- With respect to coverage offered, determine whether it is affordable and provides minimum value.
- If no coverage option is both affordable and provides minimum value, identify costs to make coverage affordable and provide minimum value.

Proposed 6055 and 6056 Reporting Requirements

Statutory Reporting Requirements

- 6055—Reporting related to the individual mandate
 - Who? Providers of MEC
 - What? Identity of *all* individuals covered under the MEC and the duration covered
- 6056—Reporting related to 4980H
 - Who? Employers
 - What? Information related to coverage offered to full-time employees
- Notice 2013-45: Reporting requirements delayed until 2015 (i.e. reporting not required until 2016 for 2015 year)

Proposed 6055 Reporting Regulations

- Who is required to report?
 - Issuers in the exchange not required to report exchange coverage
 - Employer sponsored plans
 - Fully insured—the Insurance carrier
 - Self-insured—the “plan sponsor”
 - 414 aggregation rules do NOT apply
 - » One member may assist the others (but others must sign)
 - Governmental employers may use “designated person” to file

Proposed 6055 Reporting Regulations

- What is required to be reported to IRS?
 - Name, (last known) address and TIN (or date of birth) of
 - “responsible person”—this is NOT limited to active employees; includes former employees and would appear to include guardians of QMCSO “alternate recipients”
 - Each individual covered
 - Reasonable effort rule for collecting TIN of dependent
 - Name, address and EIN of employer maintaining the plan
 - The months the individuals had MEC during the calendar year
 - 1 day in the month is a whole month
 - Not based on plan year
 - No reporting required for HRAs that supplement MEC

Proposed 6055 Reporting Regulations

- How to Report?
 - Electronic filing required unless “small employer” (determined based on aggregate forms)
 - Due February 28 (march 31, if electronic)
 - Form 1095-B

Proposed 6055 Reporting Regulations

- What is required to be furnished to individuals?
 - Same information reported to the IRS with respect to that individual
 - Due January 31 of each year
- How?
 - Mail
 - Electronic delivery—requires advance consent
 - One statement per address
 - Not required to furnish a statement to someone who is not the responsible individual

Proposed 6056 Reporting Regulations

- Who is required to report to IRS?
 - Each applicable large employer member!!!
 - Administrator of multiple employer plan to which employer contributions can file on behalf of employer
 - One form for each employer
 - Employer signs
 - Third parties can assist (employer remains liable)
 - ALE member can file for others

Proposed 6056 Reporting Regulations

- What is required to be reported?
 - Name, address and EIN of employer
 - Name, telephone number of contact
 - Calendar year reported
 - Certification whether MEC coverage was offered to full-time employee (with dependent coverage available) for each month
 - The full-time employee's share of cost of lowest cost MEC that provides MV
 - The number of full-time employees each month during the year
 - Name, address of each full-time employee during the calendar year and the months covered

Proposed 6056 Reporting Regulations

- How to report?
 - Electronic
 - Small employer exception
 - Due February 28 (march 31 if electronic)
 - 1094-C

Proposed 6056 Reporting Regulations

- Information expected to be requested using codes:
 - Whether coverage is MV
 - Whether coverage was affected by waiting period
 - Total number of employees each month
 - Whether the employer was not conducting business during a month
 - Whether ALE member expects to be an ALE member in the subsequent year
 - If ALE member is part of controlled group
 - Whether full time employee is treated as eligible to participate to MEP due to employer's contributions
 - If MEP is reporting on behalf of employer, the address of MEP administrator

Proposed 6056 Reporting Regulations

- Additional information with respect to each full-time expected to be requested using codes for each month:
 - MEC providing MEC was offered to:
 - Employee only
 - Employee and employee's dependents only
 - Employee and the employee's spouse only
 - Employee, spouse and dependents
 - Coverage was not offered to employee and
 - Employee was in a waiting period
 - Employee was not full-time that month
 - Employee not employed during that month
 - Coverage was offered for the month but was not a full-time employee
 - The ALE member satisfied one of the affordability standards

Proposed 6056 Reporting Regulations

- What is required to be furnished to full-time employee?
 - Same information with respect to full-time employee
 - Name, address, EIN of employer
- When is it required to be furnished?
 - January 31
- How?
 - Mail
 - Electronic but only after consent

Proposed 6056 Reporting Regulations

- Optional methods-employer could use one or more of these for full-time employee:
 - No 6056 employee offered the same coverage with static cost for all 12 months
 - Report instead using W-2 code
 - Code would indicate level of coverage (if MV), no coverage, or not MV
 - No need to identify full-time employees to IRS if employer certifies that all of its employees to whom coverage was not offered were NOT full-time
 - Certify that all employees not offered coverage were not full-time or were not required to be offered
 - Mandatory MV, self insured coverage to all family members with no employee contribution—only satisfy 6055, put code on W-2, and summary information on 6056 transmittal.