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together

Affordable Care Act Considerations for Retail Companies

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Overview of the Issues

- Employer Shared Responsibility Penalty
  - How does it work and how can it be avoided?
  - Should it be embraced fully or in a limited fashion?
- Prohibition on 90-Day + Waiting Period
  - Are your plan's eligibility requirements affected?
- Are Exchanges a Viable Alternative?
  - How will they work?
  - Who will be eligible for a subsidy?

When Does the Employer Mandate Apply?

- Typically effective 1.1.2014
- No exception or delay for collectively bargained plans, even if collective bargaining agreements are midterm

When Does the Employer Mandate Apply?

- Limited delayed effective date rules for non-calendar year plans
  - Delayed until start of non-calendar year for any employee eligible to participate on 12.27.2012
  - Delayed until start of non-calendar year for all employees (whether or not previously eligible) if:
    - *Offered plan to at least one-third of all employees at most recent OE; or*
    - *Covered at least one-quarter of all employees on any day between 10.31.2012 and 12.27.2012*
      - Not all will qualify!

Who Is Subject to the Employer Mandate?

- Only large employers
  - On average, at least 50 full-time (FT) employees on business days during the <u>previous</u> calendar year
    - *Six-consecutive-month transition rule for 2013*
  - Determine if “large” by adding together:
    - *FT employees and*
      - 30 hours per week (or 130 hours per month)
    - *FT employee equivalents*
      - Total hours worked by part-time (PT) employees divided by 120
    - *From all controlled group employers*

Who Is Subject to the Employer Mandate?

- Special rules for:
  - *Seasonal employees*
  - *New employers*
  - *Predecessor employers (reserved for future guidance)*
- Most employers will know, well in advance of 2014, whether they are subject to the employer mandate

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So I’m Subject to the Mandate—Now What?

<table>
<tr><th>No Coverage Penalty</th><th>Inadequate Coverage Penalty</th></tr>
<tr><td>If employer does not offer Minimum Essential Coverage (MEC) to at least 95% of its FT employees and dependents (dependents means children up to age 26, but not spouses)</td><td>If employer offers MEC to at least 95% its FT employees and their dependents, but the coverage is not Affordable and/or does not provide Minimum Value</td></tr>
<tr><td colspan="2">AND

One FT employee enrolls in an Exchange <u>and</u> receives a subsidy</td></tr>
<tr><td>Employer must pay penalty of:

$2,000 ($166.67/month) for <u>all</u> FT employees (less 30)
(including those receiving MEC)</td><td>Employer must pay penalty of:

$3,000 ($250/month) for each FT employee receiving a subsidy (capped at the maximum No Coverage Penalty)</td></tr>
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Penalty Trigger

- Key event is when at least one FT employee enrolls in the Exchange and receives a subsidy
- No subsidy is available if:
  - Eligible for Medicaid (100%-133% of federal poverty level)
  - Household income is more than 400% of federal poverty level
  - Eligible for employer-sponsored coverage that is affordable and of minimum value
- Penalty is calculated separately for each controlled group member
  - For No Coverage Penalty, 30-employee reduction is apportioned across controlled group members

Who Is a Full-Time Employee?

- Average 30 hours of service/week
  - For non-hourly employees, actual hours, or equivalency of 8 hours/day or 40 hours/week
  - 130 hours of service/month can be used
  - Hours of service include hours for which the employee works and is paid and/or is entitled to pay (includes vacation, disability, paid leave, etc.)
- Different from large employer determination
  - No need to combine PT employees into FT equivalents
- Determined on a controlled group basis
  - Very challenging for transfers within a controlled group

Who Is a Full-Time Employee?

- Determination of FT status
  - Under statute, this is determined monthly on an ongoing basis
    - *Administratively difficult and unpredictable for variable-hour or seasonal employees whose FT status is unknown*
    - *Regulators do not want individuals with variable hours moving in and out of coverage (and in and out of subsidized Exchange coverage) on a monthly basis*
    - *Employees whose status is clearly FT when hired must be offered coverage within 90 days of hire*

Who Is a Full-Time Employee?

– Voluntary safe harbor method for new variable-hour and seasonal employees

- *Permits employers to calculate employee hours during an initial measurement period (3-12 months after employment) and lock in the resulting status for the following stability period (6-12 months)*
- *Employer can define periods, subject to consistency, based on categories of employees (salaried/hourly, union/non-union, different entities, different states)*
- *Short (less than 2 months) administration period to start coverage if using full initial measurement period*
- *Will be complicated to track and implement*
  – With flexibility comes complication!

Who Is a Full-Time Employee?

– Voluntary safe harbor method for ongoing employees

- *Permits employers to calculate employee hours during a consistent ongoing measurement period (3-12 months) and lock in the resulting status for the following stability period (6-12 months)*
- *Employer can define periods, subject to consistency, based on categories of employees (salaried/hourly, union/non-union, different entities, different states)*
- *Likely tied to open enrollment process and timing*
- *Full three-month administration period to start coverage*
- *Must transition new variable-hour and seasonal employees to this ongoing measurement process*

Who Is a Full-Time Employee?

- For new employees who are reasonably expected to work full time (an average of 30 hours of service/week) at the time of hire,
  - Employer will not be subject to a penalty for failure to offer coverage for up to the initial three calendar months of employment
  - This rule is slightly different than the 90-Day Rule (*discussed later*)

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What About Non-FT Employees?

- Employers are not subject to either penalty for employees who are non-FT employees
- No affordability requirement applies to non-FT employees, so may be able to pass through costs of compliance, but may cause loss of grandfather status
- Reducing work hours/overtime or raising benefits costs (i.e., denying benefits) is risky:
  - ERISA 510
  - ACA whistleblower

What Is Minimum Essential Coverage?

- Necessary to avoid the No Coverage and Inadequate Coverage penalties
- Coverage constitutes MEC if it is under an “eligible employer-sponsored plan” (insured or self-insured)
  - No particular level or type of benefits required, but must meet ACA coverage mandates, e.g.:
    - *No annual or lifetime limits on essential health benefits (no more mini-meds)*
    - *Dependent coverage to age 26*
    - *No cost-preventive services (for non-grandfathered plans)*
    - *Cost-sharing limits (for non-grandfathered plans)*

What Is Minimum Essential Coverage?

- Not required to offer 10 categories of essential health benefits
- Cannot be limited to excepted benefits (e.g., certain dental/vision, fixed indemnity)
- Multiemployer plans qualify

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What Is Minimum Value?

- Necessary to avoid Inadequate Coverage Penalty
- Generally plan must cover at least 60% of total allowed costs in four core categories of benefits:
  – Physician and midlevel practitioner care,
  – Hospital and emergency room services,
  – Pharmacy benefits, and
  – Laboratory and imaging services
- Determined by design-based safe harbor, calculator (available on HHS website), or actuarial certification

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When Is Coverage Affordable?

- Necessary to avoid Inadequate Coverage Penalty
- Premium for cheapest employee-only coverage must be less than 9.5% of household income
  - No cap on spouse/children premiums
    - *May be up to COBRA cost of coverage*
  - Wellness program incentives not accounted for in premium costs, except tobacco cessation programs

When Is Coverage Affordable?

- Three safe harbors:
  1. W-2: Premium cannot exceed 9.5% of the employee's W-2 wages from the employer for that year
     - *Annual retrospective review*
  2. Rate of Pay: Premium cannot exceed 9.5% of the employee's hourly rate of pay (or monthly salary) multiplied by 130 hours at the beginning of the coverage period
     - *Applies prospectively, but employer cannot reduce employee's wages during the year*
     - *Ignores pay for hours in excess of 130*

When Is Coverage Affordable?

3. Federal Poverty Line: Premium cannot exceed 9.5% of an amount equal to the federal poverty line for a single individual for the year divided by 12
   - *Predictable; works as a fail-safe*
   - *Roughly $90/month (2013)*

Who Is a “Play” Employer?

- ...only an employer that avoids both the No Coverage and Inadequate Coverage penalties
  - This can be a tough challenge
    - *Inadvertent failures are the big concern*

Who Is a "Pay" Employer?

- An employer that pays either the No Coverage or Inadequate Coverage Penalty
- May decide to "pay" for part or all of FT employees
  - $2,000 times all FT employees (minus 30) looks cheaper than typical group health coverage; but
    - *Expect penalties to increase*
    - *Employees will ask for wage increases to reflect forgone subsidies*
    - *Loss of tax-favored benefit*
  - It may make sense to not offer adequate coverage to certain categories of FT employees, and pay the $3,000 for those who obtain subsidized coverage

Multiemployer Plan Transition Rule

- An employer that contributes to a multiemployer plan is not subject to the penalties if:
  - Employer is required to contribute to multiemployer plan on behalf of FT employee under collective bargaining agreement
  - Coverage under multiemployer plan is offered to FT employee and his/her dependents
  - Coverage is affordable and of minimum value
    - *May measure affordability based on actual wages or hourly wage rates under applicable collective bargaining agreement*
- If penalty is due, employer must pay it and identify the FT employee for payment purposes
- Rule applies through 2014

90-Day Waiting Period: General Rule

- Applies to all plans for plan year on or after Jan. 1, 2014
- Eligibility waiting period based solely on the lapse of time may be no more than 90 days
  - Waiting period is the time period that must pass before an employee or dependent who is *otherwise eligible* to enroll becomes effective
  - "Otherwise eligible" means having met the plan's substantive eligibility requirements (e.g., job classification, licensure requirements, FT status)
  - Coverage is not required for someone who is not eligible under plan terms

90-Day Waiting Period: Application

- If employee meets plan's eligibility requirements as of date of hire, coverage must be effective by 91st day after hire
  - 90 days includes holidays and weekends, and is not equal to 3 months
- 90-Day Rule applies to PT employees eligible for coverage
- Special rules:
  - Variable-hour employees
  - Cumulative hours of service requirement (no more than 1,200 hours)

Individual Mandate

- Individuals must have MEC (including employer-sponsored coverage) or pay a monthly penalty
  - Certain categories exempt (e.g., religious exemption, incarcerated, low income, non-citizens)
- Disclosed through federal tax return
- Non-coverage penalty (whichever is higher):
  - 2014: $95 or 1% of income
  - 2015: $325 or 2% of income
  - 2016: $695 or 2.5% of income

Overview of Exchanges

- Web-based marketplace to buy health insurance as an individual or a small group
  - Exchanges (for individuals)
  - Small Business Health Operations Program (SHOP, for small businesses)
  - Large employers may be able to participate in 2017
- HHS establishes rules and parameters for Exchanges
- States determine whether and how to create Exchanges:
  - State Exchange (17 states)
  - Federally Facilitated Exchange (27 states default)
  - Partnership Exchange (7 states)

(State counts based on June 20, 2013 data from Kaiser Family Foundation)

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Exchange Coverage and Functions

- Available Coverage:
  - Qualified Health Plans (QHPs) That Offer Essential Health Benefits
  - Bronze (60%), Silver (70%), Gold (80%), Platinum (90%), and Young Invincible (catastrophic plan for under age 30)
  - Initial Open Enrollment is Oct. 1, 2013 to Mar. 31, 2014; Ongoing Open Enrollment is Oct. 15 to Dec. 7 of previous year
- Core Functions:
  - Consumer Assistance
  - Plan Management, Financial Management
  - Eligibility, Enrollment

Exchange Coverage and Subsidy

- Individuals are eligible for subsidized Exchange coverage when:
  - Income between 100%-400% of federal poverty level (FPL)

2013 Federal Poverty Level Annual Income							
*	100%	133%	150%	200%	250%	300%	400%
1	$11,490	$15,282	$17,235	$22,980	$28,725	$34,470	$45,960
2	$15,510	$20,628	$23,265	$31,020	$38,775	$46,530	$62,040
3	$19,530	$25,975	$29,295	$39,060	$48,825	$58,590	$78,120
4	$23,550	$31,322	$35,325	$47,100	$58,875	$70,650	$94,200

*Number of Family Members – add $4,020 for each additional family member at 100%

Health Insurance Exchange – Premium Assistance Subsidy (2012)

Income as % of FPL	Expected Premium as % of Income	Income Single	Premium for 2nd Lowest Sliver Plan	Individual Pays	Government Pays
<133%	2%	<$14,856	$5,000	up to $297	up to $4,703
150%	4%	$16,755	$5,000	$670	$4,330
200%	6.3%	$22,340	$5,000	$1,407	$3,593
250%	8.05%	$27,925	$5,000	$2,248	$2,752
300%	9.5%	$33,510	$5,000	$3,184	$1,186
400%	9.5%	$44,680	$5,000	$4,245	$755
>400%	Full Premium	>$44,680	$5,000	$5,000	$0

ACA Webinars

- ACA Considerations for Employers (2.28.2013)
  - http://www.morganlewis.com/index.cfm/fuseaction/publication.detail/publicationID/8cd8f0a9-4f6b-4170-a73a-3451008094d6
- ACA Considerations for Group Health Plans (3.12.2013)
  - http://www.morganlewis.com/index.cfm/fuseaction/publication.detail/publicationID/f5c8601d-373c-4e4a-9850-671bb3b82499
- ACA Considerations for Individuals (3.21.2013)
  - http://www.morganlewis.com/index.cfm/fuseaction/publication.detail/publicationID/04845943-61b7-49de-bb0e-baf9d3403d4e
- The ACA and Collective Bargaining: Smart Negotiations (6.11.2013)
  - https://morganlewisevents1.webex.com/morganlewisevents1/lsr.php?AT=pb&SP=EC&rID=6998772&rKey=fc98358ff9f634b7

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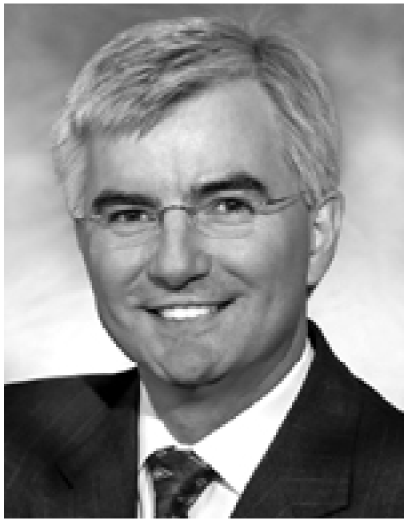
Questions?

Contact Information



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