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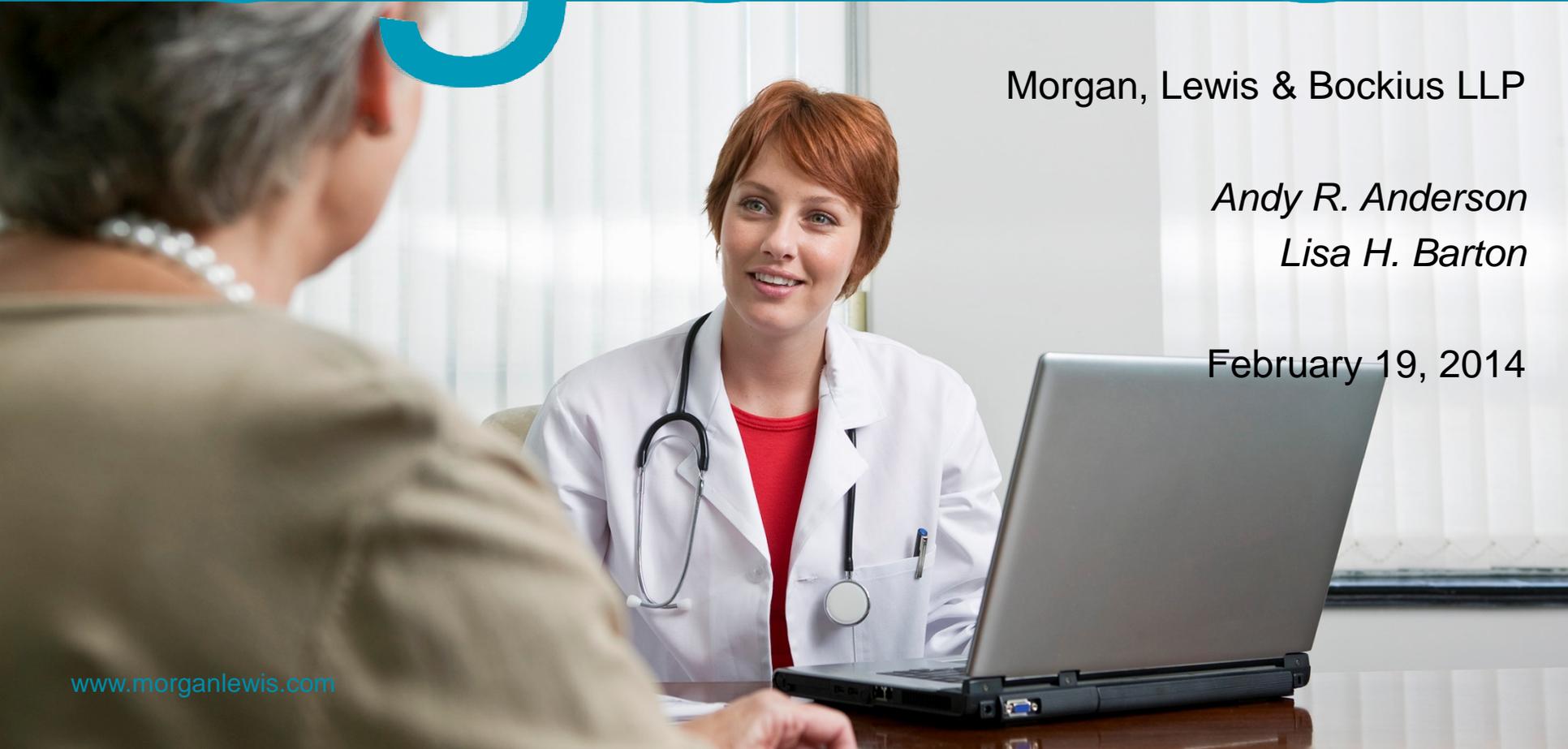
Final Affordable Care Act Shared Responsibility Rules: The Last Piece for the 2015 Puzzle

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Final Shared Responsibility Rules

- Released 2.10.2014
 - Prior day (2.9.2014) was a key date in numerous transition rules
 - Finalizes proposed rules from late 2012
- Key concepts:
 - Very similar in scope and content to proposed rules
 - *Retains and expands proposed transition rules*
 - *Retains and expands full-time employee determinations*
 - *Retains and clarifies affordability safe harbors*

Final Shared Responsibility Rules

- Confirms 2015 Shared Responsibility effective date for large (100 or more FTE/FTEq) employers
 - *Expands proposed 95/5% “offer” rule to 70/30% for 2015, but can still lead to “inadequate coverage” penalty*
 - *The 70% expansion creates new planning opportunities*
- Delays Shared Responsibility effective date until 2016 for mid-size employers (50 to 99 FTE/FTEq)
 - *Numerous requirements and a necessary certification in order to qualify*
 - *Places new emphasis on when an employer is “small” enough to escape Shared Responsibility rules for 2015*

Final Shared Responsibility Rules

- Lots (and lots, and lots) of small detail changes that are grounded in comments to the proposed rules and special interest lobbying
- Final Regulations are generally “clean” for 2016 and beyond
 - *Special rules, transition relief, etc. are found in the preamble to the final rules, the preamble to the proposed rules, and releases that predate the proposed rules*
 - Must, as a result, check multiple sources, particularly for 2015 specifics

Final Shared Responsibility Rules

- Preamble nice overview of law, prior guidance, and proposed rules
- See also new Q&As on IRS website:
 - <http://www.irs.gov/uac/Newsroom/Questions-and-Answers-on-Employer-Shared-Responsibility-Provisions-Under-the-Affordable-Care-Act>
- Imbedded expectation for more “subregulatory” guidance in a number of areas
 - *Such as additional FAQs, Q&As, etc.*
- Next up: Reporting Rules

Prior/Future Material

- ACA considerations for employers
 - <http://www.morganlewis.com/index.cfm/publicationID/8CD8F0A9-4F6B-4170-A73A-3451008094D6/fuseaction/publication.detail>
- ACA considerations for group health plans
 - <http://www.morganlewis.com/index.cfm/publicationID/F5C8601D-373C-4E4A-9850-671BB3B82499/fuseaction/publication.detail>
- ACA considerations for individuals
 - <http://www.morganlewis.com/index.cfm/publicationID/04845943-61B7-49DE-BB0E-BAF9D3403D4E/fuseaction/publication.detail>
- Companion LawFlash to Final Rules is in the pipeline

Who Is Subject to the Shared Responsibility Rules in 2015?

- Only employers with 100 or more FT/FTeq employees
 - On average, at least 100 FT/FTeq employees on business days during the previous calendar year (initially 2014)
 - *Six-consecutive-month transition rule for 2014*
 - Determine if “large” by adding together:
 - *FT employees*
 - 30 hours per week (or 130 hours per month)
 - *FT employee equivalents*
 - Total hours worked by all PT employees divided by 120
 - *From all controlled group employers*
 - Reserved for government and church employers

Who Is Subject to the Shared Responsibility Rules in 2015?

- Special rules for:
 - *Seasonal employees (reasonable good faith definition)*
 - *New employers (look at reasonable expectation for current year)*
 - *Counts all employees—even those eligible for Medicare, Medicaid, or other employer coverage*
 - *Exempts most overseas employees*
 - *Predecessor employers (still reserved for future guidance)*
- Most employers will know, well in advance of 2015, whether they are subject to the employer mandate

Who Is Subject to the Shared Responsibility Rules in 2016?

- Expanded to include employers with 50-99 FT employees
 - Applied the same as 2015 rules for larger employers
 - Measured on the basis of 2014 workforce
 - *Must maintain size and hours of workforce for period from 2.9.2014 to 12.31.2015*
 - *Must maintain previously offered coverage (if any) from 2.9.2014*
 - *Must certify compliance as part of section 6056 reporting*
 - Which apparently will apply to such employers for 2015
 - *Does not generally carryover other 2015 transition rules*

Non-Calendar Year Plans

- There are revised and new (but still limited) delayed effective date rules for non-calendar year plans existing (and not modified) after 12.27.2012
 - Delayed until start of non-calendar year for any employee eligible to participate 2.9.2014
 - Delayed until start of non-calendar year for all employees (whether previously eligible or not) if:
 - Offered plan to at least 1/3 of all employees at most recent OE before 2.9.2014; or
 - Covered at least 1/4 of all employees on a day in 12-month period ending 2.9.2014

Non-Calendar Year Plans

- Delayed until start of non-calendar year for FT employees (whether previously eligible or not) if:
 - Offered plan to at least 1/2 of ACA FT employees at most recent OE before 2.9.2014; or
 - Covered at least 1/3 of ACA FT employees on a day in 12-month period ending 2.9.2014
 - Useful for employers with a significant percentage of employees who will not become ACA FT employees
- Also applies to 2016 delay for smaller employers
- Regardless, must do Section 6056 reporting for all of 2015

Shared Responsibility Basics

No Coverage Penalty	Inadequate Coverage Penalty
If employer does not offer Minimum Essential Coverage to 95% of its FT employees	If employer offers coverage to its FT employees, but the coverage is not Affordable and/or does not provide Minimum Value
AND	
One FT employee enrolls in an Exchange <u>and</u> receives a subsidy	
Employer must pay penalty of: \$2,000 (indexed) for <u>all</u> FT employees (less 30) (including those receiving coverage)	Employer must pay penalty of: \$3,000 (indexed) for each FT employee receiving a subsidy (capped at the maximum No Coverage Penalty)

No Coverage Penalty

- Offer
 - At least 95% of all FT employees (and their children in 2016) or at least 70% for 2015
 - *FT employee = 30+ hours per week (130+ hours per month)*
 - *Treasury refused to increase above 30 hours*
 - *Children now excludes foster children and stepchildren*
 - Must offer coverage through end of month in which child attains age 26
 - Excludes children who are not citizens or residents of the U.S.
 - » But includes children resident in Canada or Mexico
 - Qualifying coverage . . .
 - *“Minimum Essential Coverage” (basically any ER-sponsored plan)*

No Coverage Penalty

- Or pay No Coverage penalty
 - \$2,000 times all FT employees (minus 30; 80 for 2015 only)
 - *Note: employers who have less than 30 FT employees (or 80 for 2015) will pay no penalty*
- Only applies if one FT employee enrolls in Exchange and receives a subsidy (tax credit or cost-sharing reduction, called a “Section 1411 Certification”)
 - *No subsidy available if:*
 - Eligible for Medicaid (100-133% of federal poverty level)
 - Household income is more than 400% of federal poverty level

No Coverage Penalty

- Calculated on ALL FT employees of each controlled group member separately
 - *30/80 employee reduction apportioned across controlled group members*
- Offer includes offer of coverage from:
 - Multiemployer/single-employer Taft-Harley plans
 - *Additional interim guidance for near future*
 - PEOs (if client pays more for the offered coverage)
 - MEWAs

No Coverage Penalty

- Includes Evergreen offers
- Offer by one controlled group member satisfies obligation for all members
 - *Useful for large single plan across the entire controlled group*
- No specific rules for demonstrating an offer was made
 - *Limited “no offer” opportunity for coverage providing minimum value that is free or meets Federal poverty level affordability safe harbor*

Inadequate Coverage Penalty

- Offer
 - To all FT employees (and their children in 2016)—or fail to offer to up to 5% (up to 30% in 2015) of FT employees
 - *FT employee = 30+ hours per week (130+ hours per month)*
 - *Children now excludes foster children and stepchildren*
 - Must offer coverage through end of month in which child attains age 26
 - Excludes children who are not citizens or residents of the U.S.
 - » But includes children resident in Canada or Mexico

Inadequate Coverage Penalty

- Offer
 - Qualifying coverage
 - *Is “Minimum Essential Coverage” and*
 - *Provides “Minimum Value”*
 - That is Affordable
 - *Not more than 9.5% of household income for employee-only coverage*
 - *Safe harbors (discussed later)*

Inadequate Coverage Penalty

- Or pay Inadequate Coverage penalty
 - \$3,000 per FT employee who receives subsidy (Section 1411 Certification) for Exchange coverage (capped at maximum No Coverage penalty)
 - No subsidy available if:
 - *Eligible for Medicaid (100-133% of federal poverty level)*
 - *Household income is more than 400% of federal poverty level*
 - Applied separately to each controlled group member
 - *Limits scope of penalty to only part of controlled group*

Who Is a Full-Time Employee?

- Average 30 hours of service/week
 - For non-hourly employees, 8 hours/day or 40 hours/week equivalencies
 - 130 hours/month can be used
- Different from large employer determination
 - No need to combine PT employees into full-time 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
 - *Final rules contain new details and procedures for determining status on a monthly basis*
 - Plugs some of the prior holes applicable to monthly determinations
 - Very complicated new final rules for when individuals move between different methods of determining status over their careers
 - » Special phased retirement (and similar situations) rule
 - *Employees whose status is clearly full time when hired must be offered coverage within 3 months of hire*

Who Is a Full-Time Employee?

- Voluntary safe harbor method for new variable hour, seasonal, and part-time 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 (i.e., salaried/hourly, union/non-union, different entities, different states)*
 - *Short (less than 2 months) administration period to start coverage if use full initial measurement period*
 - *Will be complicated to track and implement*
 - **Note new part-time requirements!!**

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 (i.e., salaried/hourly, union/non-union, different entities, different states)*
 - *Expected to be tied to open enrollment process and timing*
 - *90-day administration period to start coverage*
 - *Must transition new variable hour, seasonal, and part-time employees to this ongoing measurement process*

Who Is a Full-Time Employee?

– Special rules for:

- *Seasonal employees (6 month rule)*
- *Volunteers*
- *Schools*
- *Adjunct faculty (new 2-1/2 hour equivalency)*
- *Rehired employees (now 13 consecutive weeks—still 26 for educational organizations)*
- *International employees and transfers*
- *Temporary staffing firms*
- *Section 3508 employees*
- *Cruise ships*

Who Is a Full-Time Employee?

- *U.S. territories*
- *Student work-study*
- *On call hours*
- *Layover hours*
- *Religious orders*
- *Home healthcare workers*

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*
- Three optional safe harbors remain and are clarified:
 - W-2: Premium cannot exceed 9.5% of the employee's W-2 wages from the employer for that year
 - *New special rules for partial years*

When Is Coverage Affordable?

- Rate of Pay – Premium cannot exceed 9.5% of an amount equal to 130 hours multiplied by the lower of the hourly rate of pay on the first day of coverage or the lowest hourly rate of pay during each month (if reduced)
 - *Alternate is monthly salary on the first day of the coverage period—which cannot be reduced*
- Federal Poverty Line – Premium cannot exceed 9.5% of an amount equal to the Federal poverty line for the year divided by 12
 - *Can use the most recently published guidelines in effect 6 months prior to the beginning of the plan year*

Lingering Concerns

- Nondiscrimination rules
 - Particularly worrisome if employer has different health coverage across its controlled group
- ERISA section 510 claims
- ACA Whistleblower claims
- Cadillac Tax
 - Some coverage may be too rich for 2018
 - *Is 2015/2016 the time to cut back?*

Questions?

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