ASHHRA
THE HUMAN SIDE OF HEALTHCARE

What Health Care HR Needs to Know About the Affordable Care Act

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Agenda

- Employer Play or Pay Penalty
- Accounting for Play or Pay in A Unionized Setting
- Insurance Reforms and Other ACA Compliance Matters Relative to Health Plans
- Employee Communications Relating to Health Coverage and the New Exchanges
- The Future of Health Benefits in an ACA World

Employer Play or Pay Penalty

Employee Coverage Choices

- Individual Mandate effective 1/1/2014
  - Must have “minimum essential coverage” or pay a penalty
  - Exceptions for financial hardship & short gaps
- Minimum essential coverage includes:
  - Employer-sponsored coverage
  - Medicare, Medicaid, TriCare
  - Coverage through “Exchanges”
  - Individual insured coverage

Employee Coverage Choices

- **Premium Tax Credits**
  - Available in Individual Coverage Exchange (not in Small Employer (SHOP) Exchange)
  - Household income = 100% - 400% of federal poverty line (FPL); for 2013, in continental US:

	100% FPL	400% FPL
Individual	$11,490	$45,960
Family of 4	$23,550	$94,200

  - Not eligible if enrolled in employer-sponsored plan or eligible for employer-sponsored plan that meets affordability & minimum value requirements

"Play or Pay" Employer Mandate

- Two potential penalties:
  - No coverage penalty
  - Insufficient coverage penalty
- Generally effective January 1, 2015, following announcement of one-year delay in enforcement
  - Any additional relief for fiscal year plans?
  - Must children be offered coverage in 2015?
  - Is transition relief still available for multi-employer plans?

Coordination with 90-Day Waiting Period

- In addition, there is a separate prohibition on waiting periods in excess of 90 days
  - Separate penalty for violations
  - Does not apply to “substantive” eligibility provisions
  - What happens with new hires and variable hour employees if the lookback/stability safe harbors from the play or pay rules are not yet enforced?

No Coverage Penalty

- "Large employers" that, during a calendar month,
  - do not "offer" health "coverage" to "substantially all" "full-time" "employees" (and their "children" up to age 26) &
  - have at least one full-time employee receive a Premium Tax Credit

  owe a non-deductible penalty for that month of $166.67 for **every** full-time employee (except 30). ($2,000/year)
- Applies separately to each member of a controlled group, but 30 employee exclusion is allocated ratably among controlled group members.

Insufficient Coverage Penalty

- "Large employers" that, during a calendar month, offer health coverage that either:
  - is not "affordable,"
  - does not provide "minimum value," or
  - is only offered to "substantially all" full-time employees & their children up to age 26

  owe a nondeductible penalty for that month of $250 for each full-time employee who receives a Premium Tax Credit. ($3,000/year)
- Penalty capped at "no coverage" penalty (monthly)
- Applies separately to each member of a controlled group

What is a “Large Employer?”

- Employed, on average, 50 or more full-time employees and “full-time equivalent” employees during prior calendar year
- Determined on a “controlled group” basis
  - But, penalties apply separately to each member of a controlled group

Who is an "Employee?"

- Determined based on the common-law "right to control" basis
- Contingent workers may be your employees; any health care employer should consider:
  - contractual or temporary workers
  - traveler nurses
- Employers will be required to certify who are their full-time employees

Who is a "Full-time Employee?"

- Monthly average of at least 30 hours of service/week or 130 hours/month
- Can determine:
  - Monthly, or
  - Use look back safe harbor
- Hour of service means "each hour for which an employee is paid, or entitled to payment, for the performance of duties for the employer [or] for a period of time during which no duties are performed due to vacation, holiday, illness, incapacity (including disability), layoff, jury duty, military duty or leave of absence . . . ."

Who is a "Full-time Employee?"

- Look back safe harbor:
  - Determine full-time status based on initial "measurement period" & treat as full-time for initial "stability period"
  - An "administrative period" of up to 90 days allowed to determine who is full-time and provide for enrollment
  - If used, applies to all ongoing employees, but only new hires who are variable hour or "seasonal"
  - Other new hires are full-time based on reasonable expectation at time of hire

Managing who is a "Full-time Employee?"

- **Limiting Hours to Below 30**
  - Not prohibited by current "play or pay" guidance
  - Some employers are doing this
  - Potential ERISA § 510 claim
  - Consider normal discrimination concerns

Who Must Be Offered Coverage?

- "Must Offer" = effective opportunity to enroll (or decline enrollment) no less than once each plan year
  - If coverage terminated due to failure of employee to timely pay premium, deemed offered through end of "coverage period"
- "Coverage" includes insured and self-insured group health plans:
  - Employer-sponsored
  - Multiemployer plan coverage (special rules apply)
  - Leasing company coverage? (not clear)
- Is COBRA an "offer" of coverage – arguably yes
  - Important for furlough/strike/leave of absence during stability period
  - But, COBRA "offer" of coverage is likely not affordable

Who Must Be Offered Coverage?

- "Substantially All" means all but the greater of 5% or 5 employees
  - intentional or inadvertent
  - applies separately to each controlled group member
- "Dependent" means an employee's "child" under age 26
  - "Child" includes natural child, adopted child, stepchild & foster child
  - Need not be dependent on the employee
  - Does not include spouse

What is "Affordable?"

- Employee cost for employee only coverage in lowest cost option ≤ 9.5% of employee's household income
- Safe harbors:
  - Form W-2, Box 1 wages
    - Issue: unpaid leaves may result in unaffordable coverage, particularly if coverage offered during leave
  - Rate of pay
    - 130 x rate of pay for hourly; monthly salary for salaried
    - Issue: pay rate must remain constant throughout year
  - Individual federal poverty line ($11,490 for 2013 in the continental U.S.)
- Wellness program incentives (other than tobacco use) are ignored in determining affordability

What is “Minimum Value?”

- Plan must pay at least 60% of actuarially projected cost of covered services
- Determined using a standard population based on the population covered by self-insured group health plans
- Regulations allow various options to determine minimum value:
  - Online minimum value calculator developed by HHS & IRS
  - Checklist of plan characteristics to compare the plan’s covered services with a benchmark
  - Certification by an actuary

Paying Employer Mandate Penalty

- Based on the reports it receives from employers, individuals, and Exchanges, the IRS will estimate the employer mandate penalty and send notices to employers in 2016 (or later)
- Employers may contest the estimated penalty
  - The Exchange will also notify employers of employees receiving Premium Tax Credits
- After considering employer objections, the IRS will issue an "assessment," which is the formal determination of the amount of the penalty owed
- Employers may pay the assessment or contest it through the normal tax controversy mechanisms
- The penalty is not reported on a tax return

Accounting for Play or Pay in A Unionized Setting

Mandatory Subjects of Bargaining Need to Be Negotiated, Absent Explicit Waiver

- ACA implicates numerous mandatory subjects of bargaining
    - Whether to offer coverage and to whom
    - Standard of full-time employee for benefit eligibility
    - Type and costs of benefits
    - Be wary of “pay in lieu of benefits” provisions
- Essential health benefits package and minimum value standards can be points of reference to use when negotiating over benefit levels.
- Account for full set of employer costs including PCORI fee, transitional reinsurance fee, information reporting.

It's Not Too Early to Worry About the Cadillac Tax

- Consider potential impact of Cadillac tax beginning in 2018.
  - Obligations to pay for insured and self-insured employers
- 40% tax on value of health coverage in excess of $10,200 for self-only coverage and $27,500 for other than self-only coverage
  - No exemption for negotiated plans
  - Many benefit plans in unionized settings already exceed these thresholds
- Value amounts may be adjusted from 2010 for health inflation
- Value amounts increased:
  - if the age & gender of your employee population results in a higher health care cost than the national workforce
  - for pre-65 retirees
  - If majority of employees covered by the plan are engaged in a high-risk profession, including out-of-hospital emergency medical care (EMTs, paramedics, first responders)
  - The tax and self-insured employers

Other Concerns for Unionized Employers

- Multi-employer plans raise additional concerns about ACA compliance for employers.
- Build flexibility into the agreement, including waivers, so you can respond to legislative and regulatory changes without having to seek the union's agreement to change the contract.
- Given the complexities of the law, a new approach to bargaining health benefits needs to occur.

Insurance Reforms and Other ACA Compliance Matters Relative to Health Plans

Insurance Reforms and Other ACA Compliance Matters Relative to Health Plans

- PCORI fee
- Electronic Standard Transactions changes
- FLSA § 18B –Marketplace Notice
- 90-day waiting period limit
- Reinsurance fee
- Eliminating all pre-existing condition exclusions
- Eliminating all annual dollar limits on EHB
- New wellness program rules
- No discrimination against health care providers acting within the scope of their license
- Out-of-pocket maximum limit
- Deductible limit (small group and individual insurance)
- Coverage for approved clinical trials

Nondiscrimination Issues

- Code § 105(h) prohibits discriminating based on eligibility for or benefits in self-insured health plans in favor of 5 highest paid officers, 10% or more shareholders, & employees in top 25% of comp
- ACA expands Code § 105(h) to fully-insured coverage effective when final regs are issued
- Code § 125 prohibits discriminating in cafeteria plan benefits in favor of highly compensated individuals (currently comp of $115,000 or higher)
- All nondiscrimination rules currently apply on a controlled group basis

Premium Tax Credit Retaliation (FLSA § 18C)

"No employer shall discharge or in any manner discriminate against any employee with respect to his or her compensation, terms, conditions, or other privileges of employment because the employee (or an individual acting at the request of the employee) has:

- received a premium tax credit or cost sharing subsidy;
- provided, caused to be provided, or is about to provide or cause to be provided to the employer, the Federal Government, or the attorney general of a State information relating to any violation of, or any act or omission the employee reasonably believes to be a violation of, any Federal labor law;
- testified, assisted, or participated, or is about to testify, assist, or participate, in a proceeding about such violation; or
- Objected to, or refused to participate in, any activity, policy, practice, or assigned task that the employee (or other such person) reasonably believed to be in violation of any Federal labor law."

- Employee starts by filing retaliation complaint with OSHA

Retaliation Complaint - Procedure

- OSHA investigates and issues findings and award, if applicable
- Employee or employer can appeal OSHA's findings to a DOL Administrative Law Judge (ALJ)
  - At the ALJ-stage, the parties can engage in full discovery and have a hearing before the ALJ
- Employee or employer can appeal the ALJ's decision to the Administrative Review Board (ARB), which decides based on the ALJ's record
- ARB decision can be appealed to a federal circuit court
- Until decision is final (not until ARB decision or earlier appeal deadlines run), employee can file an action in federal district court (even after ALJ issues decision)

Retaliation Complaint – Legal Framework

- Burdens of Proof (not *McDonnell Douglas* framework)
  - Employee must establish that his/her protected activity was a contributing factor in an adverse employment action
  - Employer must prove by clear and convincing evidence it would have taken the action in the absence of the protected activity
  - These burdens are more difficult on the employer
- Employee's remedies
  - Reinstatement and/or compensation (back pay)
  - Compensatory damages
  - Attorney's fees and costs
  - Employer's remedy for frivolous/bad faith claim? Max. $1,000.00

Wellness Programs

- New wellness program regulations effective 1/1/14
  - Increases potential reward from 20% of cost of coverage to 30% (50% for tobacco use-related wellness programs)
  - Requires reasonable alternative to any "outcome-based" wellness program, regardless of whether the individual has a medical condition that prevents meeting the standard
  - Cost of this reasonable alternative must be paid for by the plan
- ADA generally prohibits requiring a current employee to answer disability-related questions or undergo a medical exam
- GINA limits the acquisition of genetic information, including family medical history

Employee Communications Relating to Health Coverage and the New Exchanges

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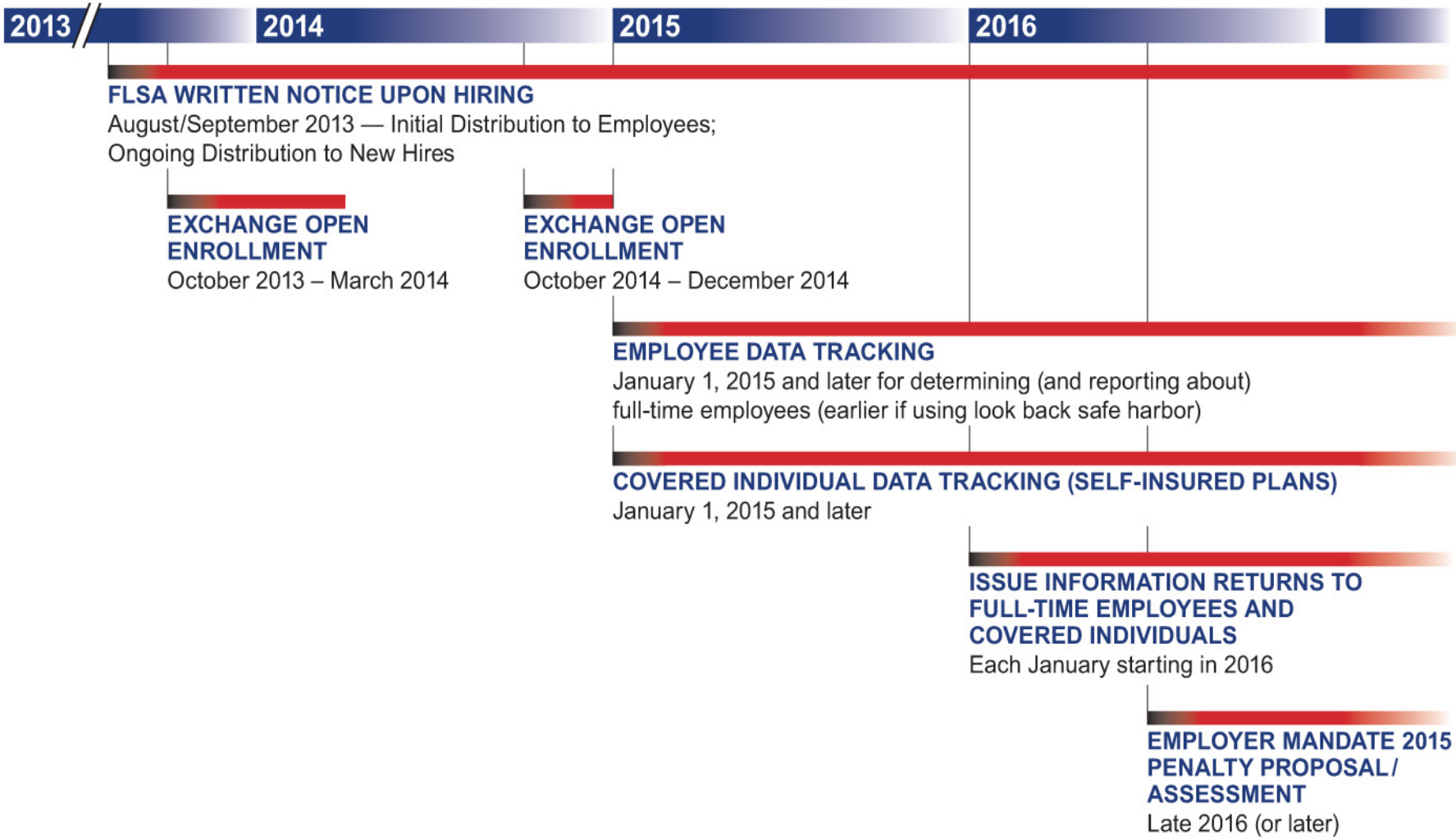
Compliance Timeline



Employee Communications

- Written Notice Upon Hire (FLSA § 18B)
- Information employees need to apply for a Premium Tax Credit
- In January 2016, employers must report to the IRS and employees about compliance with the employer mandate (Code § 6056)
- In January 2016, health plans must also report to the IRS and covered individuals about employer-sponsored coverage that allows employees to comply with the individual mandate (Code § 6055)
  - Note: statute indicates employers **need social security numbers or taxpayer identification numbers** for all covered employees and dependents in order to fully complete these filings

Employee Communications (Cont.)

- Consider how to answer questions from employees and requests for information from the Exchanges
  - Exchange contacts to verify whether employee has offer of employer-sponsored insurance
  - Exchange contacts to notify employer that employee is going to receive premium tax credit

The Future of Health Benefits in an ACA World

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The Future of Health Benefits in an ACA World

Maintain flexibility to accommodate any legislative change.

- Statute does not currently address multiemployer plans.
- Interest in moving full-time standard from 30 hours to 40 hours per week.
- Cadillac tax is hard to administer.

The Future of Health Benefits in an ACA World

Evolution from a defined benefit to a defined contribution model.

- Precedent seen in retirement plans.
- Requires legislative change.
- Private exchanges are a first step, but only with respect to asking employees to choose their plan.

The Future of Health Benefits in an ACA World

Next policy focus likely to be on payment and delivery system reforms.

- Several pilots being tried under ACA.
- These changes will affect the economics of health care employers.

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