The ACA:
Final Regulations plus Aggregation
and New Reporting under the Act

with Jim Anelli, Liz Atkinson and Pat Hurd,
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Before we begin...

- Reminder that phone lines are muted
- Direct your questions to the Chat box or the Q&A box (to host/presenters) – we’ll cover at the end as time allows
- Look for future alerts & webinars & guidances
- Share any email addresses for others within your organization that would like to be on our ACA update list
- We have applied for HRCI credit, please send an email (address below) to us if you are interested in the certificate of attendance.
- Any questions – email seminars@leclairryan.com
Today’s presenters

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Final Regulations & Failure to Implement
ACA: Structure

Overall Structure of the Affordable Care Act

I. Quality, Affordable Health Care for All Americans
   - Private Insurance Reforms § § 1001 - 1255
   - Health Benefit Exchanges § § 1301-1421, 10104-10105
   - Individual Mandate § 1501
   - Small Business Tax Credit § 1421
   - Employer Responsibilities § § 1511 – 1515
   - Protections for Employees § 1558

II. Role of Public Programs
   - Expansion of Medicaid eligibility § 2001

III. Improving the Quality and Efficiency of Health Care

IV. Prevention of Chronic Disease and Improving Public Health

V. Health Care Workforce

VI. Transparency and Program Integrity

VII. Improving Access to Innovative Medical Therapies

VIII. Community Living Assistance Service and Supports

IX. Revenue Provisions

X. Strengthening Quality Affordable Healthcare For All Americans (and Amendments)
ACA: Basic Operation

- Employer Mandate
  - Section 4980H of the Internal Revenue Code, the “Employer Shared Responsibility Provisions,” employers must offer affordable and “minimum value” health care coverage for full time employees if they have more than 50 full time employees or their equivalent (FTE’s).

- Individual Mandate
ACA

Important Definitions
(§ 1513, IRS Sec. 4980H, Notice 2011-36)

- “Full Time Employee”: With respect to any month is employed an average of at least 30 hours of service per week, or 130 hours of service in a calendar month.

- “Large Employer”: Employs an average of at least 50 FT employees on business days during the proceeding calendar year.

- “FT Employees”: Calculated using full-time employees and FTEs.

- All employees, including seasonal, that were not full-time employees for any month in the proceeding year are included in calculating the employer’s FTEs for that month.
Issue: Employers Are Faced With Daunting Task to Implement the ACA

So….. Who is Covered?

Covered Employers: Employed, on average, at least 50 full-time employees, including full-time equivalent employees (FTEs), on business days during the preceding calendar year.

1. Must First Identify Common Law Employees and Understand Aggregation Concerns with Respect to Related Employers
2. What about Part-Time, Seasonal and Variable Hour Employees
3. Problems in Calculating Hours of Service and Understanding What Plans are Healthcare Plans
4. Determining Applicable Large Employer Status
The Fast and the Furious

- Guidance under the ACA continues to be issued and rules keep changing.
- Some of the guidance is practical and makes sense, some of it does not.
New Final Treasury Regulations
Issued February 10, 2014

- Employer Shared Responsibility Payment had already been deferred for 2014.
- Effective January 1, 2015 employers are subject to penalties and face a host of reporting issues and requirements.
- Employers with fewer than 100 employees delayed until 2016.
- Relief announced in the media is much simpler than it really is—”the devil is in the details”.
Recap of the Two Types of Penalties

- Section 4980H (a) Penalty for not providing coverage if you are a “large employer”.

- Section 4980H (b) penalty if:
  - 1. Coverage is not affordable;
  - 2. Coverage does not meet minimum value; or
  - 3. There is a failure to offer any coverage to employees when the employer hits coverage target: 70 or 95%.

- Any employer can be subject to BOTH penalties—and these can add up!
Bad Guidance

- Incredibly the IRS’s press release is inconsistent with its FAQ’s that indicate that a subsection (b) penalty may be applied to all FT employees that were not given coverage even if the 70% threshold is met in 2015.
- Only explanation is that the 70% threshold is an all or nothing scenario, otherwise it makes no sense to penalize employers who meet threshold.
General Rule

- Must offer coverage to 95% of full time workforce if you are a large employer.
- Coverage must be at “bronze level” (60% of allowable costs).
- Coverage must be “affordable” under one of the safe harbors.
Transitional Rule

- For 2015, instead of coverage of 95% of workforce, you only have to cover 70%.
- THERE IS NO PARTIAL CREDIT, so:
  - If you make a mistake and only cover 69%, you are still liable for penalties as if you had not provided coverage to anybody.
- Does this make sense? No—but it is the rule for now.
More Transition

- Remember part (b) of the penalty provisions.
- Even if you offer coverage to 70% (or even 95%) of the eligible workforce **AND** that coverage meets minimum value and is affordable, you could still be liable for a penalty if:
  - An employee is not offered coverage and he or she goes to an exchange and gets a tax credit.
- So the transitional relief is not as good as it first appears.
Triggering Event

- When a *full-time* employee goes to an exchange and gets coverage and is eligible for premium tax credit.
- If no employees go to the exchange, then no penalty for employer.
- If employees go to exchange, there is a certification process that gives employer opportunity to contest determination.
- Educate your employees!
Stability and Measurement Periods

- New rules on stability and measurement periods.
- Can choose a monthly measurement or a look back measurement period of 3 to 12 months.
- Minimum measurement period is 3 months but the minimum stability is 6 months, so if you choose to do this form of measurement it will be a nightmare: use at least 6 months.
Measurement Periods

- Different measurement periods may be used by different groups of employees: salaried, hourly, union, nonunion, employees in different regions, different companies.
- Seasonal employees can work for 6 months or less, will be measured like a variable employee.
Measurement Period

- Seasonal, temporary, or part-time to full-time. Any changes in position allow a 4-month window to provide coverage before a penalty will be imposed.

- Also there is a corresponding special measurement period for employees that go from full-time to part-time.
Measurement Periods

- Simplicity is key: in large organizations the ability to track all of these different measurement periods, which can fluctuate, will be very difficult.
- Should begin looking at payroll software packages now.
- Employers will likely fail in their ability to track this and the government will fail as well.
Get Ready for the Assessment Wars

- It is clear that the IRS will be assessing penalties based on full-time employees and FTE’s who receive tax credits.
- There may well be little incentive to fight off small penalties, but collectively such assessments could be significant.
- There will be an opportunity to respond, but will the IRS assessment be like a tax lien, where you have to pay first and fight later?
How Do Employees Get Tax Credits

- Employees can get tax credits if their employers do not offer coverage, (which must include dependent coverage) or if the coverage offered is not affordable (based on employee W-2 filing for at least 2015) or if the coverage does not provide minimum value.

- If an employer provides such coverage then no tax credit will be given. Employer controls this aspect and its report to the IRS should govern the IRS’s decision in this area, but this is not clear yet.
The Payroll Department: Your Gatekeeper for Penalties

- The new Forms 1094 and 1095 will be the way that the IRS knows about whether employees are offered coverage.
- Reporting is annual, but reports MONTHLY data.
- Likely that employees may incorrectly claim premium tax credits or identity thieves may do that—the reporting forms 1094 and 1095 are the employer’s preventative measure.
Who Administers These Penalties?

- The IRS will assess and collect the Employer Shared Responsibility payments.
- Remember that coverage is measured on a month by month basis.
- The required reporting will give IRS the mechanism to determine whether an employee was eligible for employer coverage.
Another Trap for the Unwary

- It is important to track hours accurately to avoid potential claims re: full time status (30+ hours).
- This will be particularly true of variable hour employees, non-hourly employees and seasonal employees.
- Also work time can include things like putting on uniforms, being on call, and working for different employers.
Anti-cutback Rules

- Transitional relief is clear that employers with under 100 employees cannot cut back benefits already offered to qualify for transitional relief or layoff employees to get to under 100 employees unless for a valid business reason.
- But also for employers over 100 employees: example, if dependent coverage is offered, can’t cut it back.
Dependent Care

- Currently plans that offer dependent care must cover dependents (as defined by the ACA) up to age 26: then COBRA, Exchange coverage or medicaid will kick in (must look at state rules too).
- Under transitional rules: employers who did not offer dependent coverage were able to get a safe harbor if they “took steps” to provide dependent coverage in 2014.
- The new guidance extends this to 2015, but only applies to dependents that were not covered in 2013 or 2014 or if the plan did not provide for coverage or did not provide MEC: no cut back rule.
90-day Waiting Period Rules

- New rules released February 20th.
- Does not change definition of waiting period.
- Does not change measuring period.
- Waiting period for multi-employer plans—no real change: just an additional example.
“Orientation Period” Proposed Rules

- Issued February 20, 2014.
- Provide that ONE MONTH is the maximum allowed orientation period.
- Ok to start the 90 day waiting period on the first day after the orientation period.
Aggregation and the New Reporting Rules under the ACA
New final Treasury Regulations

- These were released March 10, 2014
- There are two code sections 6055 and 6056
- Require information returns (Forms 1095) to be filed in 2016 to report information for the 2015 calendar year
Who Reports on What Form

- 6055 requires insurers (including self-insurance plans) to report on “minimum essential coverage” This enables IRS to enforce individual mandate.
- 6055 compliance requires filing Form 1094-B (transmittal) and Forms 1095-B to covered individuals
- 6056 compliance requires filing Form 1094-C (transmittal) and Forms 1095-C to covered individuals
- This enables IRS to enforce employer mandate
- Large employers with self-insured plans or in multiemployer plans must comply with both Sections
Monthly info tracked on Form 1095-C

- Months for which minimum essential coverage available (for each full-time employee)
- Employee’s share of lowest cost premium by month
- The number of months employee was covered
- Plus there will be a series of codes to track information related to employee’s spouse and dependent coverage
- There will be codes to capture other data
- The spaces will have room for multiple codes
What do the forms look like?

- No draft forms yet but:
- Similar to W-2s in that employer info is on form, plus employee information
- But lots of detailed monthly information that must be tracked MONTHLY
- Systems need to be put in place NOW
Aggregation Rules for Reporting

- Entities treated as a single employer under Section 414(b), (c), (m) or (o) are one employer for “applicable large employer status” but file separately for information reporting purposes.
- Can file a “combined form” for reporting information under both 6055 and 6056
More Codes than 007

- Does plan provide minimum value?
- Is spousal coverage offered?
- Was coverage affected by a waiting period?
- Was employee credited hours of service during the month?
- Is employee an employee in an aggregated group of employers?
- Is employer a contributor to multi-employer plan?
- LOTS of stuff to track!
Streamlined Reporting

- Coding system to show:
  - 1. Minimum essential coverage: who was it offered to? Employee, Emp + Spouse, Emp+Dep, Emp+Sp+Dep
  - 2. Coverage not offered: but—not subject to a 4980H penalty, or employee not full-time or employee not employed during that month, or no other code or exception
  - 3. Coverage offered by not required during that month
  - 4. Affordability safe harbor met
Filing Deadlines

- Notice 2013-45 gave transition relief until 2016
- Filing schedule like W-2s, 1099s and other info returns
- First statements must be furnished to employees by February 1, 2016, then filed with IRS by March 1\textsuperscript{st} (or March 31\textsuperscript{st} if done electronically)
- Note that issuers of 250 or more 1095s must file electronically
- Note that normal deadlines are 1/31, 2/28 and 3/31 (in 2016 1/31 and 2/28 are Sundays)
Delivery of Statements to Employees

- Many employees receive payroll information electronically.
- However, because an employee cannot give informed consent for a statement that employee does not have information about and statement will be used regarding eligibility for premium tax credit, there must be SPECIFIC CONSENT to electronically receive Forms 1095.
- This is an important requirement as employees who erroneously claim premium tax credits are likely to be penalized by IRS.
Alternative Reporting Methods

- Reporting based on Certification of Qualifying Offers
- 98% Offers: Option to report without Separate Identification of Full Time employees
- Transition relief for Large Employers with fewer than 100 employees
- Combination of Alternative Reporting Methods
Certification of Qualifying Offers

- Employer must certify the following:
- For all months during the calendar year that an employee was full time (30 hours per week):
  1. Employer offered minimum essential coverage that met minimum value rules (to employee, spouse and dependents)
  2. Employee cost of coverage did not exceed 9.5% of federal poverty level (In 2015, this is $1,110 per year)
- This is called a “qualifying offer”
- Then employer can provide a simplified statement showing that employee received qualifying offer.
Transitional Reporting of QO for 2015

- If employers offer family coverage to 95% of full time employees, can use simplified, streamlined reporting for entire workforce (note this is only for tax yr. 2015)

- Caution: have to make a contact available within employer (or a Third-Party Administrator) re: counseling on eligibility for premium tax credits

- Statements to employees will either certify all 12 months or specific months (and note that that creates a situation where employees can be eligible for partial premium tax credits)
98% Offers

- Employer certifies it offered family coverage to 98% of full time work force
- Certification includes that the cost met an affordability safe harbor
- Why 98%? Makes sure that the 95% was exceeded so there should not be 4980H(a) penalties, without having to show which employees are full time and which are part time
Other Alternatives

- Mandatory no-cost minimum value under self-insured plan
- In this case, there is no issue of affordability because no cost to employee
- Reliance on actuarial determination of minimum value
Multiemployer Plans

- Section 6056 does not apply to the multiemployer plan.
- Instead the return required under this Section relates to the employer’s potential liability under the Section.
- Thus Treasury and IRS do not have authority to transfer the reporting obligation to the multiemployer plan.
Multiemployer Contribution Rules

- Section 6056 reporting permits the Plan Administrator to prepare Forms 1095 for the full time employees covered under the Collective Bargaining Agreement.
- Then Employer would prepare Forms 1095 for those not covered by CBA who do not participate in Plan.
- Plan Administrator would need to file separate forms for each contributing employer (because employer’s info must be shown).
- Plan can assist in furnishing statements to employees.
Multiemployer Problems

- Regulations require ONE transmittal (Form 1094)
- This poses a problem because Employer must combine the Forms 1095 from Plan and from itself into one transmittal
- Also, Employer remains liable for the reporting penalties and is the responsible entity for compliance with Form 6056
Penalties and Relief

- Reporting failures are subject to $100 per form penalty for incorrect forms or missing statements up to maximum $1.5 million per year.
- Penalties imposed pursuant to Code Sections 6721 and 6722.
- For 2016, there is relief from penalties for statements with incorrect or incomplete information if employer can show good faith efforts, but no relief for missing or late statements.
- Section 4980D provides for a $100/day penalty in connection with substantive coverage issues multiplied by all employees impacted. The cap is $500K if unintentional or unlimited if intentional (re: Hobby Lobby matter).
Reporting under Section 6055

- This is required from providers of coverage (such as self-insured plans)
- Plan sponsor must report—either single employer, or in the case of a multiemployer plan this means the association, committee, board of trustees or other group.
- The final regs do not require the plan to report the EINs of the participating employers (but keep in mind those employers will be filing their own sets of forms under Section 6056)
What is reported

- As with the 6056 reporting, reporting is on a MONTHLY basis.
- Unlike the 6056 reporting, there is reporting on each covered individual (such as spouses, dependents), whereas 6056 focuses on employee.
- Form is filed under primary insured’s tax id # (or DOB if no tax id) but must report on all covered persons.
- Same filing deadlines as the 6056 requirements.
- Must file electronically if 250 or more forms.
- Same penalties for incomplete, incorrect or missing forms as 6056.
- Can reduce penalty if corrected form filed within 30 days.
Complying with both Sections

- Self-insured large employers who must report pursuant to 6055 and 6056 can file all information on Forms 1094-C and 1095-C and complete both sections.
- In multiemployer plan situations, the Plan will file Forms 1095-B and the participating employers will file Forms 1095-C (with assistance of Plan).
Potential Problems

- Complying with the reporting requirements is complex and requires the coordination of a lot of data—many opportunities for error.
- IRS matching of data to administer the individual and employer mandates is also complex and subject to errors.
- A typical employee will now receive a W-2, a 1095-B and a 1095-C.
Concerns for Employers and Plans

- Systems for capturing and reporting data
- Data breaches
- Identity theft
- Accuracy of tax identification numbers
- Penalties for incorrect, incomplete, missing forms
- Increased burden on HR/Payroll
Link to Final Regs Alert

The LeClairRyan Affordable Care Act Team

- Dedicated, cross-practice team for ACA issues, online at www.leclairryan.com/affordable-care-act-team/

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Appendix A: Principal Federal Programs

Medicare and Medicaid were signed into law July 30, 1965, as amendments to Title XVIII and XIX of the Social Security Act.

Medicare is Health Insurance for:
- People aged 65 or older,
- People under age 65 with certain disabilities, and
- People of all ages with end-stage renal disease
  - Part A hospital coverage (Inpatient care, skilled nursing)
  - Part B medical insurance (Usually monthly premium, doctor’s services and outpatient care)
  - Part C Medicare advantage plans (Health plan choice, Medicare program pays fixed amount to private companies. Extra coverage for vision, hearing, dental)
  - Part D prescription drug plans (Monthly premium to lower prescription drug costs)

Medicaid: Needs based welfare program that pays directly to providers and/or depending on State rules may require the patient to provide some amount of co-payment.

Appendix B: Federal Health Care Fraud and Abuse Laws

The False Claims Act

The Anti-Kickback Statute
- Statute: 42 U.S.C. § 1320a-7b(b)
- Safe Harbor Regulations: 42 C.F.R. § 1001.952

The Physician Self-Referral Law
- Statute: 42 U.S.C. § 1395nn
- Regulations: 42 C.F.R. §§ 411.350-.389

The Exclusion Authority
- Statutes: 42 U.S.C. §§ 1320a-7, 1320c-5
- Regulations: 42 C.F.R. pts. 1001 (OIG) and 1002 (State agencies)

The Civil Monetary Penalties
- Statute: 42 U.S.C. § 1320a-7a
- Regulations: 42 C.F.R. pt. 1003

Criminal Health Care Fraud Statute
- Statute: 42 U.S.C. §§ 1347, 1349

The Patient Protection and Affordable Care Act of 2010 as amended by the Healthcare and Education Reconciliation Act of 2010
- Public Law no. 111-148, 111-152 (ACA)
Thank You