



***The Affordable Care Act:
What Employers and Companies Must Know***

January 18, 2013

Before we begin...

- Reminder that phone lines are muted
- Direct your questions to seminars@leclairryan.com with ACA question in the subject line
- We'll respond to you as quickly as we can
- 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

Today's presenters



Jim Anelli

Newark

Labor &
Employment

Neil Ekblom

New York

Healthcare

Liz Atkinson

Norfolk

Taxation

Joel Nied

Norfolk

Corporate

Mike Ruggio

*Washington,
D.C.*

Regulatory
Compliance

Overview of the
*Large Employer “Shared Responsibility”
Under the Affordable Care Act*

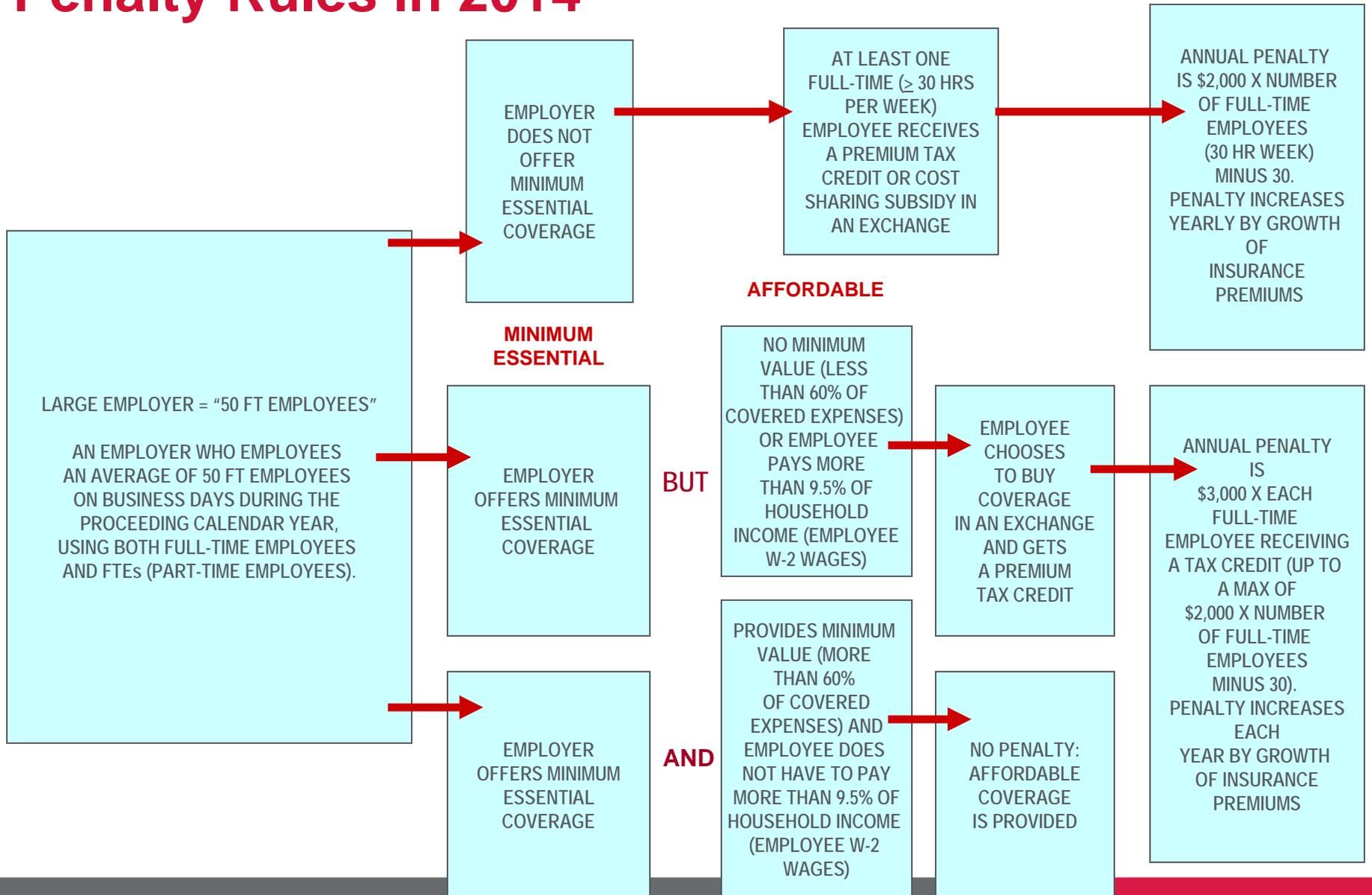
*(Patient Protection and Affordable Care Act, Public Law 111-148,
and the Healthcare and Education Reconciliation Act of 2010,
Public Law 111-152, Collectively, the Affordable Care Act)*

Neil Ekblom

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)**

Penalty Rules in 2014



ACA Definitions, Act §1513, IRS Section 4980H, Notice 2011-36

- “Full Time Employees”: 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

Calculating the Number of FT Employees to Determine Large Employer Status

1. Calculate the number of full-time employees, including seasonal employees, for each calendar month for preceding year
 - A. 30 or more hours per week or 130 or more hours in calendar month
2. Calculate the number of FTEs, including seasonal employees, for each calendar month in preceding calendar year
 - A. Add up number of hours of employees who were not full-time during month (not more than 120 hours attributed to any employee)
 - B. Divide total hours of service by 120
3. Add the number of full-time employees and FTEs calculated in (1) and (2) for each of the 12 months in the preceding calendar year
4. Add up the 12 monthly totals and divide the sum by 12. Round down to nearest whole number

Calculating the Number of FT Employees to Determine Large Employer Status Continued...

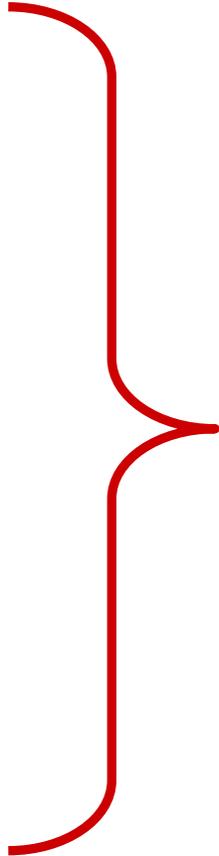
5. If the number of FT employees is less than 50 the business is not a large employer for the current calendar year
6. If the number of employees is 50 or more, the business is a large employer, unless the seasonal exception applies
7. Seasonal retail worker exceptions:
 - A. If business exceeded 50 FT for 120 days (4 calendar months) or fewer during calendar year, and
 - B. The employees in excess of 50 who were employed during the same period were seasonal employees, then
 - C. The employer is not a large employer

Updated Treasury Regulations

- January 2nd, 2013, Release of 26 CFR 1, 54 and 301
- 95% Rule
- Minimum Value Threshold

ACA Reporting and Disclosure Requirements for Employers

- Grandfather status statement
- Rescission, 30 day advance written notice
- Patient Protection notice (new plans)
- Lifetime Limits notice
- Annual Limits Waiver notice
- Claims and Appeals notice
- Summary of Benefits and Coverage (SBC) + 60 day modification notice
- W-2 Reporting of Cost of Employer – Provided Coverage
- Explanation of Exchanges
- Automatic Enrollment notice



To
Employee
Participants
and/or
Beneficiaries

ACA Reporting and Disclosure Requirements for Employers



Internal Revenue Codes:

§ 6055 – Applicable to Providers of Minimal Essential Coverage

§ 6056 – Applicable to Large Employers

Private Health Insurance Litigation Under ACA

ACA

EMPLOYER
MANDATE

NOTICE
PROVISIONS

INSURANCE MARKET
REFORMS

MINIMUM
STANDARDS FOR
EMPLOYER
SPONSORED
HEALTH PLANS (ESI)

EXISTING STATUTES

EMPLOYEE
RETIREMENT INCOME
SECURITY ACT
(ERISA) § 502

PUBLIC HEALTH
SERVICES ACT
(PHSA) TITLE XXVII

FAIR LABOR
STANDARDS ACT
(FLSA) PRIVATE
CLAIMS OR DOL

INTERNAL REVENUE
CODE (IRC) CHAPTER
100

ENFORCEMENT BY PRIVATE CLAIMS



TARGETS:

BENEFIT PLANS

FIDUCIARIES

INSURANCE
COMPANIES

Examples of Potential Benefit Plan Litigation

- Challenge anything not covered
- Seek coverage for “essential health benefits”
- Challenge grandfather status
- Use ERISA, PHSA or FLSA to challenge workforce restructuring
- Challenge internal \ external reviews
- Challenge employer use of state exchanges

ACA Section 1558 - Protection for Employees: A New Whistleblower Provision

- An employee who has been discharged or discriminated against can file a complaint under Section 2087(b) of Title 15 U.S.C.
- Retaliation must be related to the employee's assistance in an investigation into the employer's failure to comply with requirements of Title I or refuses to participate in any activity the employee reasonably believed to be in violation of Title I.
- After OSHA evaluation of initial complaint, the employee may file a civil action in federal court and obtain a jury trial and demand reinstatement, injunctive relief, back pay with interests, and other litigation costs.
- The employee has 180 days from the violation to submit the complaint to OSHA and within 90 days of OSHA's determination or 210 days after filing the original complaint, the employee may file the civil action.
- Employer retaliation is broadly defined: job reassignment, failure to promote, pay reduction, etc.

Mandates for Employers and Companies

“Employee” Issues and Tax Considerations

Jim Anelli and Liz Atkinson

Starting point for the ACA is...

Section 4980H of the Internal Revenue Code

Under Code Section 4980H,
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)

When to start capturing hourly information on all employees?

- While the ACA's health care coverage provisions become effective January 1, 2014, employers must start now to determine if they are covered by Section 4980H
- There will be some safe harbors provided for 2014 if employer has less than 50 FTE's for a six consecutive month period in 2013

Employees and aggregation

- Who is an employee? An employee means an individual that is an employee under the IRS's "common law" test, such that many independent contractors could be employees entitled to coverage if the employer has the requisite number of employees, when including such common law employees in the total amount of FTE's
- Importantly, groups and companies with common ownership will likely be aggregated together to determine if these common controlled companies, when combined, have the requisite number of FTE's
- The aggregation standards to be applied here will be governed by tax and employee benefit standards

Full Time Equivalents

- In determining if a company has 50 or more FTE's the IRS has provided several, complicated look back tests that generally use a 6 month test in 2013 and then a 3-to-12 month test thereafter
- Special rules are being proposed for employees that do not track their time, but have not yet been finalized, but they appear to consider whether such employees are expected to work more than 30 hours per week
- All employers are impacted: for profit, not for profit and governmental
- Foreign-based employment does not count, unless employer does not consider income paid to be foreign-based

- New employers: the IRS is requesting guidance at this point, except it appears that IRS will include new employers if the expectation is that they will have 30 FTE's during the year that they start business
- Calculating FTE's is extremely complex and will require consultants and tracking of information on a long-term basis
- Employers must also count paid time off (PTO) towards the hourly levels in measuring an employee's work hours to compute FTE's and their equivalents and employers will be able to average their number of employees during a year to take into account seasonal employees and fluctuating numbers of employees

Starting in 2013...

- Tracking for employers must start this year and at least 6 consecutive months needed for safe harbor
- New proposed regulations and guidance statements are being released on a monthly basis
- Other issues concern seasonal employees or employees with variable work hours
- Bottom line: it may be better to assume coverage if close to 50 FTE mark

Individual Mandate

- Requires individuals who are not exempt to purchase health care coverage
- Those who are exempt include:
 - Incarcerated individuals
 - Members of Indian tribes
 - Members with certain religious beliefs
 - Undocumented aliens
 - Health care ministry workers
 - Individuals covered by Medicaid or Medicare

Penalty—tax for not obtaining insurance

Flat dollar amount:

\$95 in 2014, \$325 in 2015, \$695 in 2016 and later

Percentage of household income over filing threshold
(1% in 2014, 2% in 2015, 2.5% in subsequent years)

GREATER of these two calculations

Cap is national average cost of “bronze level” insurance policy

Premium Assistance Tax Credit

- For low income individuals who obtain coverage through an exchange, UNLESS
- They are eligible for other minimum essential coverage that is affordable and provides minimum value (60%)
- Low income is defined as between 100-400% of federal poverty level
- Household size includes dependents as defined in Tax Code (whether or not they are subject to penalty for minimum health coverage)

Small Employer Health Insurance Tax Credit

- Notices 2010-44 and 2010-82
- Fewer than 25 FTEs
- Average annual wages less than \$50K per FTE
- “Qualifying Arrangement”

Reporting

- Info reporting on W-2 of aggregate cost of employer sponsored coverage
- (Transitional relief for small employers filing fewer than 250 W-2s)
- Large employers must also file an annual information return with IRS reporting the terms and conditions of the health care coverage provided to full-time employees

Implementation Problems

- Household income measurement poses difficulty and can result in excess credit that IRS will recover back – there will be a W-2 safe harbor
- Flow of data between IRS and HHS poses difficulties with information matching
- IRS may have to collect penalties but HHS has to define “hardship” exceptions to penalties
- ID theft cases pose special problems

What should employers do?

- Evaluate current health plans and implement reporting systems
- If no current plan, determine what coverage needs to be provided and cost of penalties
- Determine effect on workforce
- Communicate with employees

Who owns the process?

- CFO's role
- Human Resources Dept. role
- Payroll Providers
- Outside CPA / Benefit Consultant
- Plan Administrators
- Legal Team

Planning ideas

- Self-insurance
- Part time workers

Transactional Concerns

Joel Nied

Transactional Issues

Acquisitions - Grandfathered Plans

- In 2011, 97% of employers with 101 or more employees offered health benefits to their employees.
- 92% - 51 to 100 workers (92%) and significantly lower for employers with
- 57% - 50 or fewer employees

Transactional Issues

Acquisitions - Grandfathered Plans cont.

- 72% of employers currently provide insurance that complies with the Act.
- Do not provide “Essential Health Benefits”.
- “Grandfathered Plans”

Transactional Issues

Acquisitions - Grandfathered Plans cont.

- “Grandfathered Plans” may be less expensive than EHB plans.
- May result in higher post-closing expenses.
- Pro formas must consider possible increased costs.

Transactional Issues

Acquisitions - Controlled Groups

- ACA applies to employers with more than 50 FTE's
- Employees of multiple corporations/LLC could be consolidated

Transactional Issues

Acquisitions – Controlled Groups

- **26 USC Section 1563**
- **Parent-Subsidiary**
- **Brother-Sister -**
 - Two or more corporations if 5 or fewer persons who are individuals, estates, or trusts own stock possessing more than 50 percent of the total combined voting power of all classes of stock entitled to vote or more than 50 percent of the total value of shares of all classes of stock of each corporation, taking into account the stock ownership of each such person only to the extent such stock ownership is identical with respect to each such corporation.

Regulatory Concerns: Whistleblower Enhancements and More

Mike Ruggio
Jim Anelli

ACA Section 1558 - Protection for Employees: A New Whistleblower Provision

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- Retaliation must be related to the employee's assistance in an investigation into the employer's failure to comply with requirements of Title I or refuses to participate in any activity the employee reasonably believed to be in violation of Title I.
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Whistleblower Enhancements Under ACA

- A. Retention of “Overpayments” more than 60 days under ACA could be a FCA.
- B. More Whistleblowers!
- C. Greater Coordination between the Government and Whistleblowers.
- D. De Facto Strict Liability for Management.
- E. Financial Incentives to Forego Hotline.

Whistleblower Enhancements Under ACA

Retention of Overpayments

- 60 day rule created to allow for normal reconciliation of Medicare, Medicaid, Contract payments.
- Companies must report overpayments and explain reasons for any overpayments.
- However, inflated interim payment(s) may trigger the “obligation” to repay within 60 days, not following reconciliation.
- Purpose of the rule is to ensure that companies are not rewarded for failing to have internal controls and compliance programs to detect fraud.

Whistleblower Enhancements Under ACA

More Whistleblowers!

- Contractors or Agents of Company now qualify under FERA and ACA.
- “Public Disclosure” bar weakened under ACA.
 - Even WikiLeaks could provide source material for whistleblowers!
- Anybody can be a whistleblower under Dodd-Frank.
- Retaliation claims will increase as well as either a claim under the ACA or under the state whistleblower laws.

Whistleblower Enhancements Under ACA

Greater Coordination between the Government and Whistleblowers

- Delegation of CID authority to USAO offices makes it easier to conduct parallel criminal/ civil investigations.
- AUSA can share information from CID with Relator; unclear what limits individual AUSA may require; if any.
- Even if Government doesn't intervene, Relator has the benefit of CID information.
- ACA requires greater coordination between states; HHS must establish data collection program.

Whistleblower Enhancements Under ACA

De Facto Strict Liability for Management

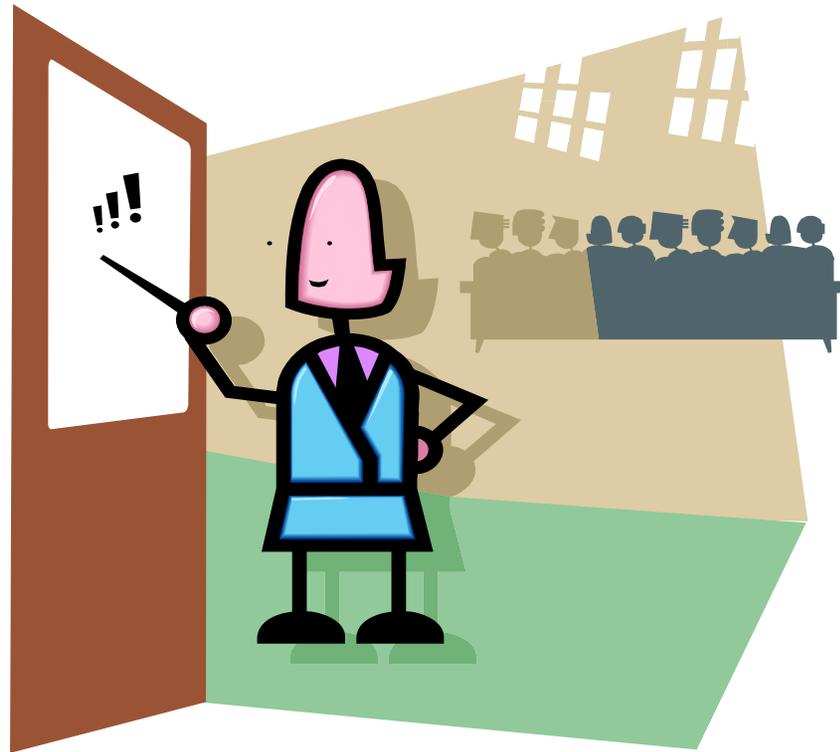
- Liability increased, even in the absence of “intent” or “knowledge” by senior management
 - Materiality instead of “intent to defraud” under FERA.
 - Park Doctrine strict liability.
- Liability for third-party conduct
 - Liability not limited to employees, but expands to include contractors and agents, particularly in FCPA context.

Whistleblower Enhancements Under ACA

Financial Incentives to Forego Hotline

- Whistleblowers incentivized to forego internal reporting through the hotline and to retain a qui tam lawyer, especially under Dodd-Frank.
- SEC regulations won't be published until later this year.

Summary



Questions?

Reminder to send them to
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