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What's Ahead for 2015: Preparing Your Nonprofit's Group Health Plan for the Employer Mandate

September 16, 2014

Venable LLP

Washington, DC

Moderator:

Jeffrey S. Tenenbaum, Esq., Venable LLP

Panelists:

Thora A. Johnson, Esq., Venable LLP

Harry I. Atlas, Esq., Venable LLP

Christopher E. Condeluci, Esq., CC Law & Policy

Todd J. Horn, Esq., Venable LLP

Presentation

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Tuesday, September 16, 2014, 12:30 p.m. – 2:00 p.m. ET

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Upcoming Venable Nonprofit Events

Register Now

October 21, 2014 – Fundraising 201: An Update on Managing the Legal Risks of Nonprofit Fundraising

November 19, 2014 – Enhancing the Nonprofit Governance Model: Legal Pitfalls and Best Practices

(Registration open soon)

Agenda

- "Play-or-Pay" Rules
- Identifying Full-Time Employees
- Affordability and Minimum Value Standards
- Reporting Obligations
- Interacting with Exchanges (the "Health Insurance Marketplace")
- Litigation Risks
- Next Steps

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Introduction to the Play-or-Pay Rules

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Introduction to the Play-or-Pay Rules

- Individual Mandate (effective January 1, 2014)
  - The Patient Protection and Affordable Care Act (ACA) requires individuals to maintain minimum essential coverage or pay a penalty tax.
  - Some individuals qualify for a premium subsidy from the government to purchase such coverage on the Exchanges.

Introduction to the Play-or-Pay Rules

- Employer Mandate (generally effective January 1, 2015)
  - A one-year delay; originally effective January 1, 2014
  - Special rules for fiscal year plans
  - The ACA imposes a mandate on large employers to offer minimum essential coverage to their full-time employees and their dependent children (up to age 26) or pay a penalty tax
  - In addition, if that minimum essential coverage is not affordable or does not provide minimum value, the employer is subject to a penalty tax

Introduction to the Play-or-Pay Rules

- The Employer Mandate applies to "applicable large employers," defined as "an employer that employed an average of at least 50 full-time employees [including full-time equivalent employees (FTEs)] on business days during the preceding calendar year."
  - Determined on a controlled group basis
  - Full-time means an average of 30 hours/week or 130 hours/month
  - Common law test used for identifying employees

Note – Special Transition Rule for 2015 – At least 100 full-time employees (including FTEs)

Play-or-Pay – Penalty Tax Trigger

- A penalty tax is due for any month in which at least one full-time employee is certified to the employer as having purchased health insurance through an Exchange with a premium subsidy from the government for that coverage.
- An individual is NOT eligible for a premium subsidy offered through the Exchange if he or she is eligible for employer-sponsored coverage that is affordable and provides minimum value.

The Mechanics of the Play-or-Pay Penalties

Thora A. Johnson
Venable LLP

The "No Coverage" Penalty

- Penalty for failure to provide coverage
  - If more than 5% of full-time employees are not offered coverage and even ONE full-time employee obtains a subsidy through an Exchange → the no coverage penalty is triggered

Note – Special Transitional Rule for 2015 – if more than 30% (not 5%)

The "No Coverage" Penalty

- Penalty for failure to provide coverage
  - Penalty = $2,000/year * TOTAL number of full-time employees
    - Assessed on a monthly basis ($166.67/employee/month)
    - First 30 *(80 for 2015)* full-time employees are disregarded
- Penalty applies on an employer-by-employer basis and not on a controlled group basis
- Be careful not to play AND pay

Identifying Full-Time Employees

- An employee is full-time if he or she works an average of at least 30 hours of service/week or 130 hours of service/month
- Hours of service
  - Each hour for which an employee is paid, or entitled to payment, for performance of work; and
  - Each hour for which an employee is paid, or entitled to payment, for vacation, holiday, illness, incapacity (including disability), layoff, jury duty, military leave, or leave of absence

Identifying Full-Time Employees

- There are two measurement methods of determining "full-time" status
  1. The monthly measurement method
  2. The look-back measurement method

The Monthly Measurement Method

- Ongoing employees
  - Determine each employee's status as a full-time employee by counting the employee's hours of service for the prior calendar month
  - Little margin for error (5%, *30% for 2015*)
- New hires
  - If full-time, must be offered coverage no later than the first day of the first calendar month immediately following three full months of employment
    - Ex: Hired June 15 into full-time position, must be offered coverage as of October 1 to avoid penalties
  - Remember, maximum 90-day waiting period

The Look-Back Measurement Method

- Safe harbor to determine if employee is full-time
  - If an employee averages 30 or more hours of service per week during a measuring period → he or she should be treated as "full-time" (*i.e.*, offered coverage) during the subsequent stability period
  - There is an administrative period between the measuring period and the stability period to (1) determine if an individual is full-time, and (2) offer coverage

Measuring Period	Administrative Period	Stability Period

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The Look-Back Measurement Method

- **Standard Measuring Period** = 3 to 12 months
- **Standard Administrative Period** = Up to 90-day period between a standard measuring period and a corresponding stability period
- **Standard Stability Period** = 6- to12-month period immediately following the standard measuring period (and any applicable administrative period)

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The Look-Back Measurement Method

Ongoing Testing of Employees

Standard Measuring Period 1 **(11/1/13-10/31/14)**	**Administrative Period 1** **(11/1/14-12/31/14)**	**Stability Period 1** **(1/1/15-12/31/15)**	
	Standard Measuring Period 2 **(11/1/14-10/31/15)**	**Administrative Period 2** **(11/1/15-12/31/15)**	**Stability Period 2** **(1/1/16-12/31/16)**

The Look-Back Measurement Method

- New hires
  - Any individual reasonably expected to work at least 30 hours per week is automatically considered a "full-time" employee
  - All other employees = variable hour
    - Includes part-time employees (*i.e.*, employees not expected to work 30 hours/week)
    - "Seasonal employees" (even if they are initially expected to work 30 or more hours per week)

The Look-Back Measurement Method

- New hire reasonably expected to work 30 hrs/week
  - Must be offered coverage no later than the first day of the first calendar month immediately following three full months of employment
  - Again, remember the maximum 90-day waiting period
- New hire variable hour employee
  - **Initial Measuring Period** = 3 to 12 months from date of hire
  - Overlaps with first full **Standard Measuring Period** after employment begins

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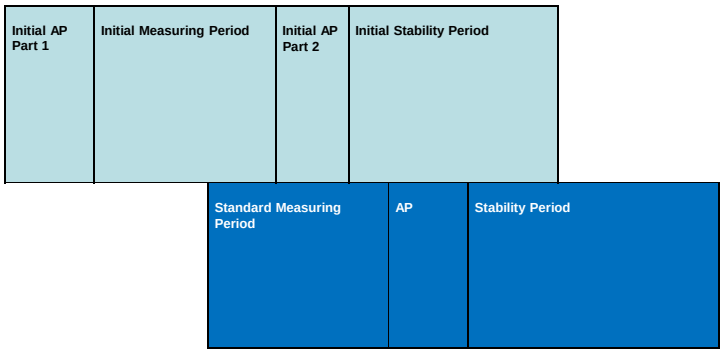
The Look-Back Measurement Method

Testing for New Variable Hour Employees



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The Look-Back Measurement Method

- Change in employment status rule
  - General rule: No changes in eligibility until next stability period
- Special rules apply to unpaid leaves of absence (such as unpaid FMLA leaves)
- Special rehire rules apply
  - Generally, rehires can be classified as new employees (and, therefore, subject to a new initial measuring period) only if they are not credited with any hours of service for at least 13 consecutive weeks

Using Different Measurement Methods

- Different measurement methods are permissible only for the following categories of employees
  - Employees employed by different entities
  - Salaried vs. hourly
  - Employees in different states
  - Collectively bargained vs. non-collectively bargained
  - Each group of collectively bargained employees
- Can't use monthly measurement for employees with predictable hours and look-back measurement method for all others

Determining Which Method to Use

- Monthly measurement
  - Not necessarily a planning tool
  - Little margin for error
  - Best for employers:
    - That offer minimum essential coverage to ALL employees
      - Use of a "skinny" or "basic" plan
    - Have employees who work steady hours
      - All employees work at least 30 hours/week, or
      - The hours worked by each employee do not vary

Determining Which Method to Use

- Look-back measurement method
  - Large portion of workforce has hours that vary; for example:
    - on call
    - per diem
    - shift
    - seasonal
  - Employer does not want to offer coverage to ALL employees
  - Employer okay with delay in coverage

The "Unaffordability" Penalty

- Penalty for not providing affordable/minimum value coverage
- Applies if:
  - Employee's share of the premium for lowest-cost employee-only coverage would exceed 9.5% of the employee's income, or an affordable plan does not provide minimum value—pay at least 60% of the allowed costs under the plan, AND
  - The employee receives a subsidy through an Exchange

The "Unaffordability" Penalty

- Penalty for providing "unaffordable" coverage
  - Penalty = $3,000/year/employee
  - Assessed on a monthly basis ($250/employee/month)
  - Applies only to employees who actually receive a premium subsidy for coverage on an Exchange

The "Unaffordability" Penalty

- Safe harbors for determining if the cost of coverage exceeds 9.5% of employee's income
  - Form W-2 compensation
  - Rate of pay
  - Federal poverty limit
- Minimum value
  - Safe harbor plan designs
  - Minimum value calculator
  - Actuarial analysis

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Reporting of Coverage to IRS and Participants

Harry I. Atlas
Venable LLP

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Overview – Code Sections 6055 and 6056

- Applies on a calendar year basis (regardless of plan year)
- Effective for 2015, with initial reports due in early 2016 (voluntary reporting permitted for 2014)
- Two overlapping sets of reporting requirements
  - Code Section 6055: Health insurance issuer/self-funded plan sponsor (to facilitate compliance with the individual mandate provisions)
  - Code Section 6056: Employers subject to the coverage mandate (to facilitate compliance with the employer mandate and premium tax credit provisions)
  - Our focus today is on the latter. Reports satisfying the latter will also satisfy the former

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Overview – Code Section 6056

- Defined terms and concepts from the employer mandate (Code Section 4980H) apply for purposes of Section 6056 reporting
- Each entity within a controlled group reports separately for its employees
- IRS has issued drafts of the reporting forms (and their instructions):
  - Form 1095-C (one form for each employee)
  - Form 1094-C (aggregated data for all employees of the reporting entity)
- No 2015 reporting exemption for employers with between 50 and 99 full-time employees who qualify for the 2015 employer mandate exemption

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Form **1095-C**
Department of the Treasury
Internal Revenue Service

Employer-Provided Health Insurance Offer and Coverage
► Information about Form 1095-C and its separate instructions is at www.irs.gov/f1095c.

600115
☐ VOID
☐ CORRECTED
OMB No. 1545-2251
2014

Part I Employee | **Applicable Large Employer Member (Employer)**

1 Name of employee	2 Social security number (SSN)	7 Name of employer	8 Employer identification number (EIN)
3 Street address (including apartment no.)		9 Street address (including room or suite no.)	10 Contact telephone number
4 City or town	5 State or province / 6 Country and ZIP or foreign postal code	11 City or town	12 State or province / 13 Country and ZIP or foreign postal code

Part II Employee Offer and Coverage

	All 12 Months	Jan	Feb	Mar	Apr	May	June	July	Aug	Sept	Oct	Nov	Dec
14 Offer of Coverage (enter required code)													
15 Employee Share of Lowest Cost Monthly Premium, for Self-Only Minimum Value Coverage		$	$	$	$	$	$	$	$	$	$	$	$
16 Applicable Section 4980H Safe Harbor (enter code, if applicable)													

Part III Covered Individuals
If Employer provided self-insured coverage, check the box and enter the information for each covered individual. ☐

	(a) Name of covered individual(s)	(b) SSN	(c) DOB (if SSN is not available)	(d) Covered all 12 months	(e) Months of Coverage: Jan	Feb	Mar	Apr	May	June	July	Aug	Sept	Oct	Nov	Dec
17				☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐
18				☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐
19				☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐
20				☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐
21				☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐
22				☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐

For Privacy Act and Paperwork Reduction Act Notice, see separate instructions. Cat. No. 60705M Form **1095-C** (2014)

IRS Form 1095-C (for each employee)

- Name, address and EIN of the reporting employer
- Name and phone number of contact person at the reporting employer (or its third-party reporting agent)
- Calendar year to which report pertains
- For each full-time employee, certification of whether the full-time employee (and dependents) were offered minimum essential coverage (MEC), by calendar month
  - Codes are used to report who received the offer of coverage, and whether MEC was offered. For example, employee only, employee and dependents (but not spouse), employee and spouse (but not dependents), etc.

IRS Form 1095-C (for each employee)

- For each full-time employee, the full-time employee's cost share for the lowest cost monthly premium for self-only coverage providing minimum value, by calendar month
  - Codes are used to report certain details necessary for evaluating compliance. For example, if the employee was not employed for the month, or was employed for the month but not on a full-time basis, whether the employee actually enrolled, or whether the employee was in a non-penalty month (such as a valid waiting period or a measurement period, etc.)

IRS Form 1095-C (for each employee)

- Self-funded plans must report details on every *individual actually covered* (including employees, dependents and spouses, regardless of whether the employee is full-time)
  - This reporting is intended to facilitate compliance with the individual coverage mandate
  - Must include name, Social Security number (or alternatively, date of birth), and months during which coverage is provided

IRS Form 1095-C (for each employee)

- Must be provided to each employee by January 31 following the reporting year
- Must be provided by mail, unless an employee *affirmatively consents* to electronic delivery

Alternative Reporting Methods Method #1

- Method #1: “Qualifying Offers”
  - Coverage offer to one or more full-time employees
  - Offer covers all months in the calendar year for which the individual was a full-time employee (except months for which there is a Section 4980H penalty exemption)
  - Coverage provides minimum value
  - Employee cost of employee-only coverage does not exceed 9.5% of the mainland single federal poverty level (which is $1,108.65 – or 9.5% of $11,670, for 2014)
  - Offer extends to dependents and spouse
  - Reported on Form 1095-C using Code 1A and avoids need to report cost of self-only employee coverage

Alternative Reporting Methods Method #1

- Method #1: “Qualifying Offers”
  - Each full-time employee who received a “qualifying offer” for all 12 months in the calendar year may be provided with a simplified statement of ineligibility for the premium tax credit, instead of the Form 1095-C filed with the IRS

Alternative Reporting Methods Method #1

- Method #1: "Qualifying Offers" FOR 2015 ONLY
  - Reporting employer makes a "qualifying offer" to at least 95% of its full-time employees, and their spouses and dependents, for one or more months during 2015
  - Reporting employer may provide a simplified statement to each employee indicating that the employee, spouse, and/or dependents may be eligible for a premium tax credit for 2015

Alternative Reporting Methods Method #2

- Method #2: "98% Offers"
  - Reporting employer certifies that it offered coverage qualifying for Section 4980H(b) penalty relief (*i.e.*, minimum value, affordable, to employee and dependents) to at least 98% of its employees who were full-time at any time during the calendar year (and are therefore subject to Section 6056 reporting)
  - Exempts employer from identifying in its Section 6056 reporting whether a particular employee is a full-time employee for one or more months during the year
  - Exempts the employer from reporting its total number of full-time employees for the year on Form 1094-C

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Form **1094-C**
Department of the Treasury
Internal Revenue Service

Transmittal of Employer-Provided Health Insurance Offer and Coverage Information Returns

▶ Information about Form 1094-C and its separate instructions is at www.irs.gov/f1094c.

☐ CORRECTED

120115
OMB No. XXXX-XXXX
2014

Part I Applicable Large Employer Member (ALE Member)

1 Name of ALE Member (Employer)
2 Employer identification number (EIN)
3 Street address (including room or suite no.)
4 City or town
5 State or province
6 Country and ZIP or foreign postal code
7 Name of person to contact
8 Contact telephone number
9 Name of Designated Government Entity (only if applicable)
10 Employer identification number (EIN)
11 Street address (including room or suite no.)
12 City or town
13 State or province
14 Country and ZIP or foreign postal code
15 Name of person to contact
16 Contact telephone number

For Official Use Only

17 Reserved . . . ☐

18 Total number of Forms 1095-C submitted with this transmittal . . . ▶

Part II ALE Member Information

19 Is this the authoritative transmittal for this ALE Member? If "Yes," check the box and continue. If "No," see instructions . . . ☐

20 Total number of Forms 1095-C filed by and/or on behalf of ALE Member . . . ▶

21 Is ALE Member a member of an Aggregated ALE Group? If "No," do not complete Part IV. . . . ☐ Yes ☐ No

22 **Certifications of Eligibility (select all that apply):**

☐ A. Qualifying Offer Method ☐ B. Qualifying Offer Method Transition Relief ☐ C. Section 4980H Transition Relief ☐ D. 98% Offer Method

Under penalties of perjury, I declare that I have examined this return and accompanying documents, and to the best of my knowledge and belief, they are true, correct, and complete.

▶ Signature ▶ Title ▶ Date

For Paperwork Reduction Act Notice, see separate instructions. Cat. No. 61571A Form **1094-C** (2014)

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120215
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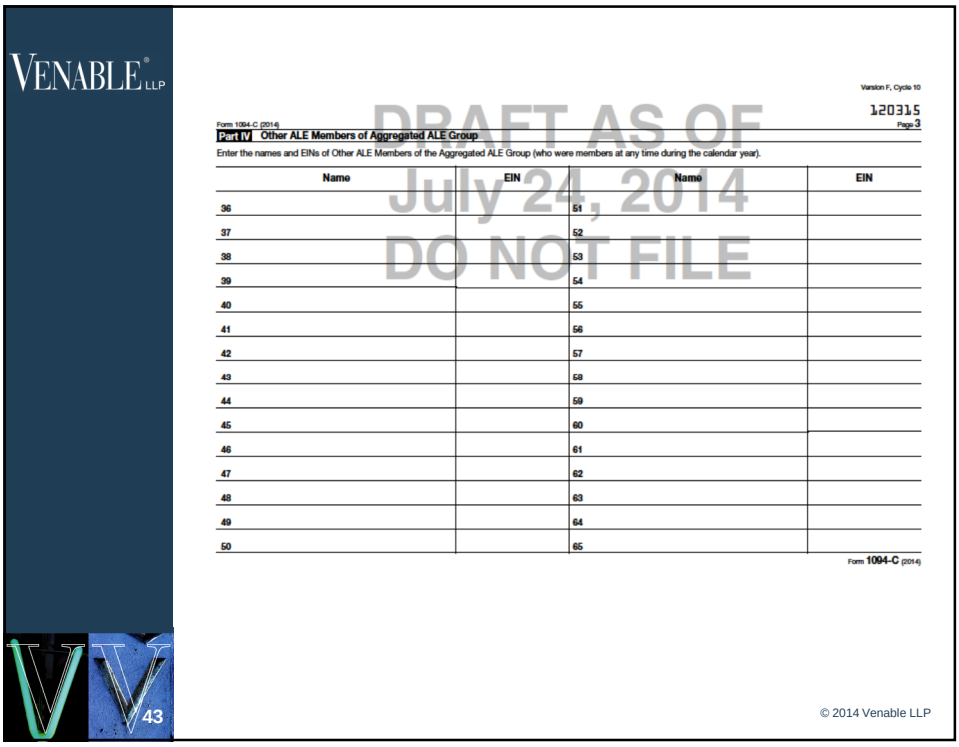
Form 1094-C (2014)

Part III ALE Member Information – Monthly

		(a) Minimum Essential Coverage Offer Indicator		(b) Full-Time Employee Count for ALE Member	(c) Total Employee Count for ALE Member	(d) Aggregated Group Indicator	(e) Section 4980H Transition Relief Indicator
		Yes	No				
23	All 12 Months	☐	☐			☐	
24	Jan	☐	☐			☐	
25	Feb	☐	☐			☐	
26	Mar	☐	☐			☐	
27	Apr	☐	☐			☐	
28	May	☐	☐			☐	
29	June	☐	☐			☐	
30	July	☐	☐			☐	
31	Aug	☐	☐			☐	
32	Sept	☐	☐			☐	
33	Oct	☐	☐			☐	
34	Nov	☐	☐			☐	
35	Dec	☐	☐			☐	

Form **1094-C** (2014)



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Form 1094-C (2014) Page 3

Part IV Other ALE Members of Aggregated ALE Group

Enter the names and EINs of Other ALE Members of the Aggregated ALE Group (who were members at any time during the calendar year).

	Name	EIN		Name	EIN
36			51		
37			52		
38			53		
39			54		
40			55		
41			56		
42			57		
43			58		
44			59		
45			60		
46			61		
47			62		
48			63		
49			64		
50			65		

Form 1094-C (2014)

Form 1094-C (IRS Transmittal Form)

- Each Form 1095-C sent to the IRS must be accompanied by a Form 1094-C
  - If an employer uses multiple Forms 1094-C, it must designate one of the Forms 1094-C as the "authoritative transmittal" and provide aggregated data (for the employing entity, not the controlled group) on such Form 1094-C

Form 1094-C (IRS Transmittal Form)

- Must report total number of Forms 1095-C submitted
- Includes checkboxes to indicate whether the employer is relying on alternative reporting method or a 2015 transitional rule
- Must self-report whether an offer of coverage was made to a sufficient percentage of full-time employees to avoid the 4980H(a) penalty
- Must report number of full-time employees (month-by-month)

Form 1094-C (IRS Transmittal Form)

- Must list every member of the employer's controlled group (including EIN)
- List must start with controlled group member with highest monthly average number of full-time employees, and proceed in descending order

Form 1094-C (IRS Transmittal Form)

- Must be filed by March 31 following the calendar year, if filed electronically
  - Must file electronically if there are 250 or more Forms 1095-C
- Must be filed by February 28 following the calendar year, if filed on paper

Penalties for Non-Compliance

- $100 per late or incorrect return filed (or not filed) with IRS (Code Section 6721)
- $100 per late or incorrect statement provided (or not provided) to a participant (Code Section 6722)
- IRS may choose to waive penalties upon a showing of reasonable cause

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Interaction with the Exchanges

Christopher E. Condeluci
CC Law & Policy

VENABLE LLP

Subsidies Offered Through Exchanges

- GENERAL RULE: An individual is NOT eligible for subsidies offered through the Exchange if he or she is "eligible" for employer-sponsored coverage
  - So, even if your employees are subsidy-eligible, they CANNOT opt out of employer coverage, go to the Exchange, and access the subsidies

Subsidies Offered Through Exchanges

- EXCEPTION: The employer-sponsored coverage (1) is "unaffordable" [*i.e.*, the employee's contribution for the lowest cost for self-only plan exceeds 9.5% of the employee's household income (or certain other "safe harbor" measures)] or (2) does NOT provide "minimum value" (*i.e.*, the employer coverage does not pay for at least 60% of the benefits provided under the plan)
  - In this case, depending upon an employee's income, an employee may opt out of employer coverage, go to the Exchange, and access the subsidies

Enrollment in Exchanges

- Open enrollment period
  - Initial open enrollment period was Oct. 1, 2013 to March 31, 2014
  - For 2015, open enrollment is Nov. 15, 2014 to Feb. 15, 2014
- Special enrollment periods
  - Through April 15, 2014 for individuals who experienced difficulty enrolling in the Exchanges because of IT issues
  - Final Exchange regulations enumerate 9 special enrollment periods, including a special enrollment period upon becoming "eligible" for a premium subsidy because employer plan is "unaffordable" or not "minimum value"
  - HHS has authority to develop additional special enrollment periods

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Enrollment in Exchanges

- Enrollment process
  - The employee must access the Exchange [through, for example, Healthcare.gov or a "web-broker entity" (WBE)]
  - Complete an application for enrollment in a "qualified health plan"
  - Complete an application for premium subsidy

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Interaction with Exchanges

- Verification process
  - If an employee goes to the Exchange and applies for a premium subsidy, the Exchange will ask the employee for information about his/her employer plan
    - If the employee indicates that his/her employer plan was "unaffordable" or did not provide "minimum value," the Exchange must access an electronic data source to verify whether this information is correct
    - If no electronic data source of information is available, the Exchange will contact the employer directly, asking the employer to verify the information

Interaction with Exchanges

- Appeals process
  - If the employer is non-responsive, the Exchange must give the subsidy to the employee
    - The employer will be assessed a penalty tax by the IRS
    - Once assessed, the employer may appeal the determination and present information showing that its plan was “affordable” and provided “minimum value”

Employee Retaliation and Other Litigation Risks under the Affordable Care Act

Todd J. Horn
Venable LLP

Imagine if you will….

- Employee receives a poor evaluation and is put on a PIP
- Employee tells her supervisor that the medical plan is not good enough under “Obamacare”
- Employee is terminated for failing the PIP
- Problem?

Imagine if you will….

- You have several employees who generally work 35 hours a week
- You reduce their weekly hours to 29 because you do not want to provide them with health care coverage
- Problem?

Imagine if you will….

- You have several individuals who work as "independent contractors"
- One complains that since you "micro-manage" him, he is really an employee and should be allowed to enroll in your health plan
- You terminate the relationship with him
- Problem?

General Overview – 29 U.S.C § 218c

- ACA amended FLSA
- Broad anti-retaliation provisions
- Broad "whistleblower" provisions
- Lawsuits and expensive remedies

Protected Activity – Participation

- Prohibits retaliation against an employee because he/she:
  - Testified, assisted, or participated (or is about to) in a proceeding concerning an ACA violation

Protected Activity – Complaints

- Prohibits retaliation against an employee because he/she:
  - Provided or "is about to" provide information to employer or government about an "act or omission" that he/she "reasonably believes" violates the ACA

Protected Activity – Opposition

- Prohibits retaliation against an employee because he/she:
  - Objected to or refused to participate in any
    - Activity, policy, practice, or assigned task,
    - That employee "reasonably believes,"
    - Violates any part of the ACA

Retaliation Prohibited

- Prohibits employer from discriminating against an employee "in any manner" with respect to his or her:
  - Terms
  - Conditions
  - Privileges of employment

Retaliation Prohibited – How Far?

- Termination
- Demotion
- Negative performance evaluation
- Discipline
- Compensation/benefits
- “Blacklisting”
- Denial of “opportunities”
- Threats/intimidation

Protected Activity – Anything goes?

- Basis of complaints or “opposition” need not be accurate
- “Reasonable belief” of violation is enough
- Motive of complaining employee may not be relevant
  - Job protection
  - “Retaliation” against the employer

Retaliation – Penalty Avoidance

- Large employers must offer compliant coverage to most "full-time" employees
- Large employer = 50+ full-time equivalents
- "Full-time" employee: averages 30 hours a week
- Two potential penalties for large employers:
  - "No coverage" penalty
  - Unaffordability penalty

Retaliation – Penalty Avoidance

- Easy solutions to avoid penalties, right?
  - Reduce number of employees so not "large employer"
  - Reduce employees' hours to less than 30 a week
  - Convert full-time employees to "independent contractors"
- Not so fast…two potential, expensive hurdles

ERISA Section 510

- Protects employee rights to present and future benefits
  - No adverse action (termination, etc.) because employee exercised rights to benefits
  - No adverse action to interfere "with the attainment of any right to which such participant may become entitled under the plan"
- Potentially covers hour reductions or changes in classification

Retaliation – Section 218c

- ACA also protects employees from retaliation by an employer because they:
  - Received a subsidy or tax credit through a health care exchange
- Reducing employee hours in response to such receipt is prohibited (OSHA fact sheet)

Retaliation Prohibited – Section 218c

- Open issue – Will reducing an employee's hours before he receives a tax credit or subsidy fall within retaliation provision?

Enforcement Proceedings

- Administrative
- Judicial
- Low burden of proof on employee
- High burden of proof on employer
- Jury trials
- Broad remedies

Risk Avoidance

- Limit argument that there was specific intent to deny benefits
  - Document legitimate, uniform reasons for decisions
  - Update handbooks and job descriptions
- "Grandfather" existing workforce
- Manage internal and external communications regarding benefit strategy and staffing decisions
- Audit IC relationships

Next Steps

Next Steps

- Determine whether to play or pay
- Determine measurement method
- Update plan documentation
- Establish record-keeping system
  - Identify full-time employees
  - Document offers of coverage
  - Gather information for new reporting
- Determine whether employer should change from a calendar plan year to a fiscal plan year

Questions?

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Harry I. Atlas, Esq., Venable LLP
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Todd J. Horn, Esq., Venable LLP
thorn@Venable.com
t 202.344.4236

To view an index of Venable's articles and presentations or upcoming seminars on nonprofit legal topics, see www.Venable.com/nonprofits/publications or www.Venable.com/nonprofits/events.

To view recordings of Venable's nonprofit programs on our YouTube channel, see www.youtube.com/user/VenableNonprofits.

Speaker Biographies

VENABLE® LLP

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Jeffrey S. Tenenbaum

Partner

Washington, DC Office

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jstenenbaum@Venable.com

Jeffrey Tenenbaum chairs Venable's Nonprofit Organizations Practice Group. He is one of the nation's leading nonprofit attorneys, and also is an accomplished author, lecturer, and commentator on nonprofit legal matters. Based in the firm's Washington, DC office, Mr. Tenenbaum counsels his clients on the broad array of legal issues affecting charities, foundations, trade and professional associations, think tanks, advocacy groups, and other nonprofit organizations, and regularly represents clients before Congress, federal and state regulatory agencies, and in connection with governmental investigations, enforcement actions, litigation, and in dealing with the media. He also has served as an expert witness in several court cases on nonprofit legal issues.

Mr. Tenenbaum was the 2006 recipient of the American Bar Association's Outstanding Nonprofit Lawyer of the Year Award, and was an inaugural (2004) recipient of the *Washington Business Journal*'s Top Washington Lawyers Award. He was one of only seven "Leading Lawyers" in the Not-for-Profit category in the prestigious 2012 *Legal 500* rankings, one of only eight in the 2013 rankings, and one of only nine in the 2014 rankings. Mr. Tenenbaum was recognized in 2013 as a Top Rated Lawyer in Tax Law by *The American Lawyer* and *Corporate Counsel*. He was the 2004 recipient of The Center for Association Leadership's Chairman's Award, and the 1997 recipient of the Greater Washington Society of Association Executives' Chairman's Award. Mr. Tenenbaum was listed in the 2012-15 editions of *The Best Lawyers in America* for Non-Profit/Charities Law, and was selected for inclusion in the 2014 edition of *Washington DC Super Lawyers* in the Nonprofit Organizations category. In 2011, he was named as one of Washington, DC's "Legal Elite" by *SmartCEO Magazine*. He was a 2008-09 Fellow of the Bar Association of the District of Columbia and is AV Peer-Review Rated by *Martindale-Hubbell*. Mr. Tenenbaum started his career in the nonprofit community by serving as Legal Section manager at the American Society of Association Executives, following several years working on Capitol Hill as a legislative assistant.

AREAS OF PRACTICE

Tax and Wealth Planning
Antitrust
Political Law
Business Transactions Tax
Tax Controversies and Litigation
Tax Policy
Tax-Exempt Organizations
Wealth Planning
Regulatory

INDUSTRIES

Nonprofit Organizations and Associations
Credit Counseling and Debt Services
Financial Services
Consumer Financial Protection Bureau Task Force

GOVERNMENT EXPERIENCE

Legislative Assistant, United States House of Representatives

BAR ADMISSIONS

District of Columbia

REPRESENTATIVE CLIENTS

AARP
Air Conditioning Contractors of America
Airlines for America
American Academy of Physician Assistants
American Alliance of Museums
American Association for the Advancement of Science
American Bar Association
American Bureau of Shipping
American Cancer Society
American College of Radiology
American Institute of Architects
American Institute of Certified Public Accountants
American Society for Microbiology

EDUCATION

J.D., Catholic University of America, Columbus School of Law, 1996

B.A., Political Science, University of Pennsylvania, 1990

MEMBERSHIPS

American Society of Association Executives

California Society of Association Executives

New York Society of Association Executives

American Society of Anesthesiologists
American Society of Association Executives
America's Health Insurance Plans
Association for Healthcare Philanthropy
Association for Talent Development
Association of Corporate Counsel
Association of Fundraising Professionals
Association of Private Sector Colleges and Universities
Auto Care Association
Biotechnology Industry Organization
Brookings Institution
Carbon War Room
The College Board
CompTIA
Council on CyberSecurity
Council on Foundations
CropLife America
Cruise Lines International Association
Design-Build Institute of America
Ethics Resource Center
Foundation for the Malcolm Baldrige National Quality Award
Gerontological Society of America
Global Impact
Goodwill Industries International
Graduate Management Admission Council
Habitat for Humanity International
Homeownership Preservation Foundation
Human Rights Campaign
Independent Insurance Agents and Brokers of America
Institute of International Education
International Association of Fire Chiefs
International Sleep Products Association
Jazz at Lincoln Center
LeadingAge
Lincoln Center for the Performing Arts
Lions Club International
March of Dimes
ment'or BKB Foundation
Money Management International
National Association for the Education of Young Children
National Association of Chain Drug Stores
National Association of College and University Attorneys
National Association of Manufacturers
National Association of Music Merchants
National Athletic Trainers' Association
National Board of Medical Examiners
National Coalition for Cancer Survivorship
National Council of Architectural Registration Boards
National Defense Industrial Association
National Fallen Firefighters Foundation
National Fish and Wildlife Foundation
National Hot Rod Association
National Propane Gas Association
National Quality Forum
National Retail Federation
National Student Clearinghouse
The Nature Conservancy
NeighborWorks America
Peterson Institute for International Economics
Professional Liability Underwriting Society
Project Management Institute
Public Health Accreditation Board
Public Relations Society of America
Recording Industry Association of America
Romance Writers of America

Telecommunications Industry Association
Trust for Architectural Easements
The Tyra Banks TZONE Foundation
U.S. Chamber of Commerce
United Nations High Commissioner for Refugees
Volunteers of America
Water Environment Federation

HONORS

Recognized as "Leading Lawyer" in *Legal 500*, Not-For-Profit, 2012-14

Listed in *The Best Lawyers in America* for Non-Profit/Charities Law, Washington, DC (Woodward/White, Inc.), 2012-15

Selected for inclusion in *Washington DC Super Lawyers*, Nonprofit Organizations, 2014

Recognized as a Top Rated Lawyer in Taxation Law in *The American Lawyer* and *Corporate Counsel*, 2013

Washington DC's Legal Elite, *SmartCEO Magazine*, 2011

Fellow, Bar Association of the District of Columbia, 2008-09

Recipient, American Bar Association Outstanding Nonprofit Lawyer of the Year Award, 2006

Recipient, *Washington Business Journal* Top Washington Lawyers Award, 2004

Recipient, The Center for Association Leadership Chairman's Award, 2004

Recipient, Greater Washington Society of Association Executives Chairman's Award, 1997

Legal Section Manager / Government Affairs Issues Analyst, American Society of Association Executives, 1993-95

AV® Peer-Review Rated by *Martindale-Hubbell*

Listed in *Who's Who in American Law* and *Who's Who in America*, 2005-present editions

ACTIVITIES

Mr. Tenenbaum is an active participant in the nonprofit community who currently serves on the Editorial Advisory Board of the American Society of Association Executives' *Association Law & Policy* legal journal, the Advisory Panel of Wiley/Jossey-Bass' *Nonprofit Business Advisor* newsletter, and the ASAE Public Policy Committee. He previously served as Chairman of the *AL&P* Editorial Advisory Board and has served on the ASAE Legal Section Council, the ASAE Association Management Company Accreditation Commission, the GWSAE Foundation Board of Trustees, the GWSAE Government and Public Affairs Advisory Council, the Federal City Club Foundation Board of Directors, and the Editorial Advisory Board of Aspen's *Nonprofit Tax & Financial Strategies* newsletter.

PUBLICATIONS

Mr. Tenenbaum is the author of the book, *Association Tax Compliance Guide*, now in its second edition, published by the American Society of Association Executives. He also is a contributor to numerous ASAE books, including *Professional Practices in Association Management*, *Association Law Compendium*, *The Power of Partnership*, *Essentials of the Profession Learning System*, *Generating and Managing Nondues Revenue in Associations*, and several Information Background Kits. In addition, he is a contributor to *Exposed: A Legal Field Guide for Nonprofit Executives*, published by the Nonprofit Risk Management Center. Mr. Tenenbaum is a frequent author on nonprofit legal topics, having written or co-written more than 700 articles.

SPEAKING ENGAGEMENTS

Mr. Tenenbaum is a frequent lecturer on nonprofit legal topics, having delivered over 700 speaking presentations. He served on the faculty of the ASAE Virtual Law

School, and is a regular commentator on nonprofit legal issues for *NBC News*, *The New York Times*, *The Wall Street Journal*, *The Washington Post*, *Los Angeles Times*, *The Washington Times*, *The Baltimore Sun*, *ESPN.com*, *Washington Business Journal*, *Legal Times*, *Association Trends*, *CEO Update*, *Forbes Magazine, The Chronicle of Philanthropy, The NonProfit Times* and other periodicals. He also has been interviewed on nonprofit legal topics on Fox 5 television's (Washington, DC) morning news program, Voice of America Business Radio, Nonprofit Spark Radio, and The Inner Loop Radio.

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Thora A. Johnson

Partner — *Baltimore, MD Office*

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Thora Johnson focuses on tax-exempt organizations, employee benefits and executive compensation matters. She advises clients on the establishment and operation of tax-exempt organizations, including private foundations, public charities, trade associations, and title holding companies. She also counsels clients on the establishment and operation of qualified and non-qualified deferred compensation plans and health and welfare benefit plans. She routinely reviews and drafts employee benefit plans, summary plan descriptions, and other employee communications and negotiates vendor contracts. She regularly works with clients to structure comprehensive compliance programs and procedures to comply with the privacy and security requirements of HIPAA. She has broad expertise in health plan compliance, including ERISA, the Internal Revenue Code, HIPAA (privacy and portability), and PPACA. She has been helping employers navigate health care reform from its enactment in March 2010, and is a frequent speaker and writer on the topic.

AREAS OF PRACTICE

Employee Benefits and Executive Compensation

Tax and Wealth Planning

Healthcare

Business Transactions Tax

Tax Controversies and Litigation

Tax Policy

Tax-Exempt Organizations

Wealth Planning

INDUSTRIES

Nonprofit Organizations and Associations

BAR ADMISSIONS

Maryland

District of Columbia

EDUCATION

J.D., *with honors*, University of Maryland School of Law, 1996

Notes & Comments Editor, *Maryland Journal of International Law and Trade*

M.A., Middlebury College, 1993

B.A., *magna cum laude*, Brown University, 1992

REPRESENTATIVE CLIENTS

Ms. Johnson represents, among others, Allegis Group, Bank of America Corporation, General Dynamics Corporation, and Greater Baltimore Medical Center.

HONORS

Recognized in *Legal 500*, Employee Benefits and Executive Compensation, 2013 and 2014

Recognized in *Chambers USA* (Band 2), Employee Benefits and Executive Compensation, Maryland, 2011 - 2014

Recognized in *Chambers USA* (Up and Coming), Employee Benefits and Executive Compensation, Maryland, 2010

ACTIVITIES

Ms. Johnson is a member of the Maryland State Bar Association and its Study Group for Employee Benefits, as well as the Tax Section of the District of Columbia Bar, the Tax Section of the American Bar Association, and the American Health Lawyers Association. She also regularly assists in pro bono matters involving charitable organizations and employee benefits. She is a trustee of the Friends School of Baltimore and has served as a director of a local charity whose mission is to help individuals find and keep entry-level, nonprofessional jobs.

RECENT PUBLICATIONS

- September 3, 2014, What's Ahead for 2015: Preparing Your Nonprofit's Group

Phi Beta Kappa

Health Plan for the Employer Mandate

- July 29, 2014, Draft Forms Released for the Affordable Care Act's Health Coverage Reporting Requirements, Employee Benefits and Executive Compensation Alert
- July 23, 2014, Will There Be Tax Credit Subsidies for Health Coverage Purchased on the Federal Exchange?, Client Alerts
- March 14, 2014, The Affordable Care Act and Nonprofit Organizations: An Overview
- February 13, 2014, Nonprofits and HIPAA Violations: An Overview
- January 2014, CMS Announces Modernized Medicare Waiver Program in Maryland, Healthcare Alert
- January 2014, Proposed Changes to "Excepted Benefits" Regulations, Employee Benefits and Executive Compensation Alert
- December 2013, IRS Issues Additional Guidance on the Application of *Windsor* to Cafeteria Plans, FSAs, and HSAs, Employee Benefits and Executive Compensation Alert
- November 2013, 2014 Dollar Limits on Compensation and Benefits, Employee Benefits and Executive Compensation Alert
- September 2013, The Impact of IRS Recognition of All Legal Same-Sex Marriages on Nonprofit Organizations' Employee Benefit Plans
- September 12, 2013, Connecting the Dots for Nonprofits on Healthcare Reform: The Exchanges, the Premium Subsidies, and the Employer Mandate
- September 2013, The Impact of IRS Recognition of All Legal Same-Sex Marriages on Employee Benefit Plans, Employee Benefits and Executive Compensation Alert
- August 8, 2013, The Road Map to HIPAA Compliance: What Your Nonprofit Needs to Know
- July 23, 2013, Evaluating Your Nonprofit's Options under the *Affordable Care Act*: The Pros and Cons of Health Insurance Alternatives for Your Employees
- July 2013, What Your Nonprofit Needs to Do about HIPAA – Now
- May 2013, What Your Business Needs to Do about HIPAA – Now, Employee Benefits and Executive Compensation Alert
- April 2013, Patient Protection and Affordable Care Act: The Impact on Employers
- April 2013, Association Health Plans and Health Care Reform: A Trap for the Unwary
- April 2013, Ten Things to Know about Modified Rules, *Bar Bulletin*
- April 2013, HIPAA 2013: New Regulations, New Impact: Responsibility, Liability Change for HIPAA Business Associates, *Bar Bulletin*
- March/April 2013, Health Coverage under the Affordable Care Act: What You [and Your Clients] Need to Know, *Maryland Bar Journal*
- January 2013, Limited Relief for Employers under Health Care Reform's "Play-or-Pay" Rules, Employee Benefits and Executive Compensation Alert

RECENT SPEAKING ENGAGEMENTS

- October 28, 2014 - October 31, 2014, ACC Annual Meeting 2014
- September 16, 2014, What's Ahead for 2015: Preparing Your Nonprofit's Group Health Plan for the Employer Mandate
- September 9, 2014, Legal Quick Hit: “What’s Ahead for 2015: Preparing Your Nonprofit’s Group Health Plan for the Employer Mandate” for the Association of Corporate Counsel’s Nonprofit Organizations Committee
- June 12, 2014, 2014 Government Contractor Mid-Market Survey and ACA Update
- May 14, 2014, What's Ahead for 2015: Preparing Your Group Health Plan for the Employer Mandate
- January 15, 2014, How to Count to 30 and Other Sophisticated Math Problems: The Real Impact of Healthcare Reform on Your Business
- September 12, 2013, Connecting the Dots for Nonprofits on Healthcare Reform: The Exchanges, the Premium Subsidies, and the Employer Mandate

- August 8, 2013, The Road Map to HIPAA Compliance: What Your Nonprofit Needs to Know
- July 23, 2013, Evaluating Your Nonprofit's Options under the *Affordable Care Act*: The Pros and Cons of Health Insurance Alternatives for Your Employees
- July 18, 2013, The Road Map to HIPAA Compliance
- July 17, 2013, The Road Map to HIPAA Compliance
- May 2, 2013, "The Changing Landscape for Employer Health Plans" at the 40th Annual Head Start Conference
- April 22, 2013 - April 25, 2013, ACG InterGrowth 2013
- January 29, 2013, "The Changing Landscape for Employer Plans: What Employers and Plan Sponsors Need to Know," National Head Start Association
- January 24, 2013, The Changing Landscape for Employer Health Plans: What Employers and Plan Sponsors Need to Know
- January 23, 2013, The Changing Landscape for Employer Health Plans: What Employers and Plan Sponsors Need to Know

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Partner

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Harry Atlas is a member of the firm's Employee Benefits and Executive Compensation Group, and handles a broad range of employee benefit and executive compensation matters. His practice includes the implementation, operation and termination of all types of retirement plans, including qualified plans, 403(b) plans and 457 plans. In the executive compensation area, Mr. Atlas' practice encompasses nonqualified retirement plans, equity compensation arrangements, and golden parachute issues. Mr. Atlas also assists clients with ERISA matters in connection with merger and acquisition transactions, and with PBGC negotiations in the context of potential or actual bankruptcy situations. He also has experience with COBRA and HIPAA.

Mr. Atlas is keenly aware of the cost pressures and financial realities facing organizations in the current economic environment. He helps clients find practical, cost-effective solutions to the complex compliance challenges arising in his practice area.

AREAS OF PRACTICE

Employee Benefits and Executive Compensation
ERISA / Employee Benefits Class Action Defense
Tax and Wealth Planning
International Tax
Business Transactions Tax
Tax Controversies and Litigation
Tax Policy
Tax-Exempt Organizations
Regulatory

INDUSTRIES

Construction
Credit Counseling and Debt Services
Education
Financial Services
Government Contractors
Hospitality and Lodging
Nonprofit Organizations and Associations
Transportation and Transportation Infrastructure

BAR ADMISSIONS

District of Columbia

HONORS

- Recognized in *Chambers USA*, (Band 2), Employee Benefits and Executive Compensation, Maryland, 2010-2014
- Recognized in *Legal 500*, Employee Benefits and Executive Compensation, 2012 and 2014

RECENT PUBLICATIONS

- July 29, 2014, Draft Forms Released for the Affordable Care Act's Health Coverage Reporting Requirements, Employee Benefits and Executive Compensation Alert
- February 27, 2014, The Impact of IRS Recognition of All Legal Same-Sex Marriages on Nonprofit Organizations' Employee Benefit Plans
- November 12, 2013, Employee Benefits for Same-Sex Couples: What Your Nonprofit Needs to Know
- November 2013, 2014 Dollar Limits on Compensation and Benefits, Employee Benefits and Executive Compensation Alert
- September 2013, The Impact of IRS Recognition of All Legal Same-Sex Marriages on Nonprofit Organizations' Employee Benefit Plans
- September 2013, The Impact of IRS Recognition of All Legal Same-Sex Marriages on Employee Benefit Plans, Employee Benefits and Executive Compensation Alert
- June 27, 2013, After DOMA: Impacts on Tax and Benefits Planning, Tax Bulletin
- April 30, 2013, Overcome the Increased Scrutiny of Your Organization's Retirement Plan

Maryland

EDUCATION

J.D., *with honors*, University of Maryland School of Law, 1997

Order of the Coif

Ner Israel Rabbinical College, 1994

MEMBERSHIPS

American Bar Association

Retirement Income Task Force of the American Benefits Council

MSBA Study Group for Employee Benefits

- April 2013, Association Health Plans and Health Care Reform: A Trap for the Unwary
- January 2013, IRS Releases Updated Retirement Plan Correction Procedures, Employee Benefits and Executive Compensation Alert
- January 2013, Limited Relief for Employers under Health Care Reform's "Play-or-Pay" Rules, Employee Benefits and Executive Compensation Alert

RECENT SPEAKING ENGAGEMENTS

Mr. Atlas presented seminars entitled "Goodbye Medical Savings Accounts, Hello Health Savings Accounts, Health Reimbursement Accounts and Flexible Spending Accounts" sponsored by Lorman Education Services in Baltimore, Maryland on August 10, 2005 and August 10, 2006.

- September 16, 2014, What's Ahead for 2015: Preparing Your Nonprofit's Group Health Plan for the Employer Mandate
- May 14, 2014, What's Ahead for 2015: Preparing Your Group Health Plan for the Employer Mandate
- February 27, 2014, "The Impact of IRS Recognition of All Legal Same-Sex Marriages on Nonprofit Organizations' Employee Benefit Plans" for Non-Profit Cooperation Circle
- November 19, 2013, I Am a Fiduciary! Now What?
- November 12, 2013, Legal Quick Hit: "Employee Benefits for Same-Sex Couples: What Your Nonprofit Needs to Know" for the Association of Corporate Counsel's Nonprofit Organizations Committee
- May 30, 2013, "Obamacare: The Challenges, Myths and Confusion" at the Public Media Business Association 2013 Annual Conference
- April 30, 2013, "Overcome the Increased Scrutiny of Your Organization's Retirement Plan" at ASAE's Finance, HR & Business Operations Conference

CC Law & Policy

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Washington, DC 20003

Christopher E. Condeluci, Esq.

Principal
CC Law & Policy
p 703.209.0690
chris@CClawandpolicy.com

Chris Condeluci is principal and sole shareholder of CC Law & Policy in Washington, DC. Chris's practice focuses on the Patient Protection and Affordable Care Act ("ACA") and its impact on stakeholders ranging from employers and "private" health insurance exchanges to agents/brokers and hospitals/health systems.

Prior to forming his own firm, Chris served as Tax and Benefits Counsel to the U.S. Senate Finance Committee. During his time in Congress, Chris participated in the development of portions of the ACA, including the Exchanges, the insurance market reforms, and all of the new taxes enacted under the law. He is one of the few senior Congressional staffers who actively participated in the health reform debate to join the private sector since the ACA's enactment, and based on his experience as an employee benefits attorney, he possesses a unique level of expertise on matters relating to tax law, ERISA, and the ACA.

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Partner

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thorn@Venable.com

With over 25 years of courtroom experience in employment cases, Todd Horn was selected as Maryland's "Lawyer of the Year" for Employment Law in 2011 by the peer-review publication, *Best Lawyers in America*.

Mr. Horn also co-authors the comprehensive legal treatise, *Maryland Employment Law* (Lexis 2013), a book that Federal and State Courts have cited as a leading reference for over two decades.

Focusing on employment law, Mr. Horn ranks as a top "Band 1" lawyer by *Chambers USA*, which reported that he "is admired as a fantastic litigator – one of the best in the courtroom, with a tremendous presence," is "very professional and efficient," and is "particularly sought out for high-stakes litigation."

After a four-week jury trial in 2013, Mr. Horn and his team obtained a defense verdict in a 13-plantiff, multi-million dollar age discrimination lawsuit. Mr. Horn regularly handles cases involving "whistleblowing," discrimination, compensation, disability accommodations, retaliation, sexual harassment, ERISA, wrongful discharge, and defamation.

Mr. Horn also has significant experience successfully defending employers in "class action" wage and hour lawsuits under the Fair Labor Standards Act (FLSA) and Maryland law. He litigated one of the only cases in Maryland resulting in the complete denial of class certification under the FLSA. *Syrja v. Westat, Inc.*, 756 F. Supp. 2d 682 (D. Md. 2010).

Mr. Horn also helps his clients avoid employee lawsuits and obtain strategic advantages in sensitive investigations, workforce reductions/reorganizations, disgruntled employee issues, and ADA/FMLA compliance.

SIGNIFICANT MATTERS

Mr. Horn regularly represents Fortune 500 companies involved in employment-related litigation in the Washington, DC - Baltimore region. His experience covers a wide range of industries including healthcare, government contractors, financial, retail, hospitality, construction, biotechnology, food service and telecommunications.

Mr. Horn served as a lead defense counsel in one of the nation's largest employment-discrimination class-action lawsuits. His other cases include:

Adedje v. Westat, Inc., 214 Md. App. 1 (2013).

Rashad v. WMATA, 945 F. Supp. 2d 152 (D.D.C. 2013).

Walters v. Transwestern Carey Winston, LLC, 2012 U.S. Dist. LEXIS 60380 (D. Md. 2012).

Panagodimos v. CNS, Inc., 2012 U.S. Dist. LEXIS 31013 (D. Md. 2012).

Mwabira-Simera v. Sodexho Marriott, 786 F. Supp. 2d 395 (D.D.C. 2011).

EEOC v. WSSC, 631 F.3d 174 (4th Cir. 2011).

AREAS OF PRACTICE

Labor and Employment

Healthcare - Labor and Employment Law

Financial Services Wage Compliance

Healthcare Cost Reduction

Regulatory

INDUSTRIES

Life Sciences

BAR ADMISSIONS

Maryland

District of Columbia

COURT ADMISSIONS

U.S. Court of Appeals for the D.C. Circuit

U.S. Court of Appeals for the Third Circuit

U.S. Court of Appeals for the Fourth Circuit

U.S. District Court for the District of Columbia

U.S. District Court for the District of Maryland

U.S. Supreme Court

EDUCATION

J.D., William and Mary Marshall-Wythe School of Law, 1987

Moot Court

B.S., Economics, *with honors*, University of Mary Washington, 1984

Phi Beta Kappa

MEMBERSHIPS

American Bar Association, Sections of Labor and Employment Law and Litigation

Maryland State Bar Association

Maryland Association of Defense Trial Counsel

Syrja v. Westat, Inc., 756 F. Supp. 2d 682 (D. Md. 2010).

Smith v. Westat, Inc., 09-CV-140-CAP (N.D. Ga. 2009).

Montgomery v. General Dynamics, 2008 WL 4546262 (S.D. Ohio 2008).

King v. Marriott International, Inc., 160 Md. App. 689, 866 A.2d 895 (2005).

Covance Laboratories, Inc. v. Orantes, 338 F. Supp. 2d 613 (D. Md. 2004).

Sherman v. Marriott Hotel Services, Inc., 317 F. Supp. 2d 609 (D. Md. 2004).

Higgins v. Food Lion, Inc., 197 F. Supp. 2d 364 (D. Md. 2002).

King v. Marriott International, Inc., 337 F.3d 421 (4th Cir. 2003).

Arbabi v. Fred Meyers, Inc., 205 F. Supp. 2d 462 (D. Md. 2002).

Lane v. Wal-Mart Stores, Inc., 2000 U.S. Dist. LEXIS 13935 (D. Md. 2002).

Aheart v. Sodexho, Inc ., 2000 U.S. App. LEXIS 7779 (4th Cir. 2000).

Hogue v. Sam's Club, Inc., 114 F. Supp. 2d 389 (D. Md. 2000).

Gedeon v. Host Marriott Corp., 1998 U.S. App. LEXIS 16903 (4th Cir. 1998).

Milton v. IIT Research Institute, 138 F.3d 519 (4th Cir. 1998).

Farasat v. Paulikas, 32 F. Supp. 2d 249; (D. Md. 1998), aff'd, 166 F.3d 1208 (4th Cir. 1998).

Cline v. Wal-Mart Stores, Inc., 144 F.3d 294 (4th Cir. 1997).

Steinacker v. National Aquarium, 114 F.3d 1177 (4th Cir. 1997).

Spriggs v. Citibank (Md.), N.A., 103 F.3d 120 (4th Cir. 1996).

Gaskins v. Marshall Craft Associates, Inc., 110 Md. App. 705 (1996).

Webb v. Baxter Healthcare Corp., 57 F.3d 1067 (4th Cir. 1995).

Borza v. Hallmark Cards, Inc., 45 F.3d 425 (4th Cir. 1995).

Fusco v. GE Government Services, Inc., 897 F. Supp. 926 (D. Md. 1995).

Glocker v. W.R. Grace, Inc., 68 F.3d 460 (4th Cir. 1995).

Riggle v. CSX Transportation, Inc., 755 F. Supp. 676 (D. Md. 1991).

HONORS

Recognized in *Chambers USA* (Band 1), Labor and Employment, Maryland, 2007 - 2014

Recognized in *Chambers USA* (Band 2), Employment: Mainly Defendant, Maryland, 2006

He also is listed in *The Best Lawyers in America* for Labor and Employment Law and Labor and Employment Litigation, (Woodward/White, Inc.)

Recognized in *Super Lawyers Business Edition*, Employment and Labor, Baltimore, 2013

Selected for inclusion in *Maryland Super Lawyers*, 2009 - 2014

Named Baltimore Labor and Employment "Lawyer of the Year," *Best Lawyers*, 2011

Leadership in Law Award, *The Daily Record*, 2006

AV® Peer-Review Rated by *Martindale-Hubbell*

Sodexho, Inc., one of the largest companies in the United States, recognized Mr. Horn and his litigation team as an "outstanding large firm outside counsel"

Named as one of Maryland's Legal Elite by *Baltimore SmartCEO* magazine in 2006

While in high school, Mr. Horn earned the rank of Eagle Scout

ACTIVITIES

Mr. Horn provides employment advice *pro bono* to charities and nonprofit organizations and is a board member of Advocates for Children and Youth.

In 2005, he coached the University of Maryland School of Law's trial advocacy team in the ABA's Labor and Employment Law Section's Student Trial Advocacy Competition.

RECENT PUBLICATIONS

In addition to co-writing the legal treatise *Maryland Employment Law*, Mr. Horn also has been a contributing author to *Employment Discrimination Law*, the official book of the American Bar Association on this subject. It has been cited by the courts of every circuit and the U.S. Supreme Court.

- July 1, 2014, Storming the Castle: Employee Whistleblowing Under ACA, *Law360*
- May 2014, Labor Pains: The $2 Million Part-Time Employee, Labor & Employment News Alert
- March 2014, A SOX in the Gut: Supreme Court Vastly Expands Workplace "Whistleblower" Law, SEC Update
- February 2014, Trojan Horse Privacy Laws: Facebook Snooping, Labor & Employment News Alert
- February 2014, Labor Pains: GINA's Turning 6, and She's Learned How to Sue!, Labor & Employment News Alert

SPEAKING ENGAGEMENTS

Mr. Horn conducts seminars covering the maze of state and federal employment laws. His dynamic presentations assist employers in complying with the expanding landscape of personnel laws and help minimize the risk of employee lawsuits at all phases of the employment relationship – from recruitment to exit interview.

Topics of his presentations include:

- accommodating employees' disabilities under the Americans with Disabilities Act
- affirmative action requirements under the Office of Federal Contract Compliance Programs regulations
- employee discipline and termination
- interviewing techniques and pitfalls
- leave issues under the Family and Medical Leave Act
- reductions in force under the federal WARN Act and the Older Workers Benefit Protection Act
- sexual harassment prevention and investigation
- wage and hour and other compensation matters under the Fair Labor Standards Act

Additional Information

VENABLE® LLP

EMPLOYEE BENEFITS AND EXECUTIVE COMPENSATION ALERT

July 29, 2014

DRAFT FORMS RELEASED FOR THE AFFORDABLE CARE ACT'S HEALTH COVERAGE REPORTING REQUIREMENTS

The Affordable Care Act (ACA) imposes new reporting requirements on employers and insurance companies offering health coverage. Last week, the IRS released drafts of the four forms that will be used by employers and insurers to make these reports beginning in early 2016 for the 2015 calendar year.

For purposes of enforcing the individual mandate, employers (regardless of their size) that sponsor self-insured health plans and insurers are required by Section 6055 of the Internal Revenue Code (the Code) to report on the individuals who are covered by their health plans. These plan sponsors/insurance carriers will provide each primary insured with the new **Form 1095-B** that will indicate the months during the calendar year that the insured and his or her family members had coverage under the plan. The plan sponsor/insurance carrier will also be required to transmit all Form 1095-Bs in one package to the IRS, with **Form 1094-B** as the transmittal "cover page."

To enforce the employer mandate, applicable large employers (ALEs) – that is, employers with more than 50 full-time employees, including full-time equivalent employees – are required by Code Section 6056 to report whether or not they offered health coverage to their employees, and will use **Form 1095-C** for these purposes. The ALE will provide each full-time employee with the Form 1095-C. This form asks ALEs to include information such as whether the employee was offered coverage and for which months and the employee's share of the lowest cost monthly premium for self-only "minimum value" coverage. The ALE submits all Form 1095-Cs in one package accompanied by **Form 1094-C** to the IRS. In addition to being the transmittal form for the Form 1095-Cs, Form 1094-C requests information on which other entities are part of the ALE's "Aggregated ALE Group."

If a large employer maintains a self-insured health plan, the employer will not be required to submit both a Form 1095-B and a Form 1095-C. Rather, the large employer with a self-insured plan will only be required to submit Form 1095-C, as the information in Form 1095-B can be included in Form 1095-C.

Comments on these forms can be **submitted to the IRS here**. Because these forms are drafts only, it is possible that the forms will undergo changes before being finalized by the end of 2014. Additionally, draft instructions for these forms have not yet been released, and are expected to be published in August.

As you prepare for 2015, these draft forms can serve as a guide to help you put the proper systems in place to track the required information and generate the required reports. Please contact one of Venable's employee benefits attorneys with any questions you may have about preparing for these reporting requirements.

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July 23, 2014

WILL THERE BE TAX CREDIT SUBSIDIES FOR HEALTH COVERAGE PURCHASED ON THE FEDERAL EXCHANGE?

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There is no letup in the intensity of the litigation wars surrounding the Affordable Care Act (ACA) or in the significance of the matters at issue. In 2012, the Supreme Court narrowly upheld the ACA in the face of a full-scale attack while invalidating the ACA's Medicaid expansion requirements. A month ago, the Court invalidated the ACA's requirement that employers provide contraceptives if doing so violates the employer's religious beliefs. And this week, two federal circuit courts of appeals split on the important question of whether subsidies are available for individuals who purchase insurance on the federal exchange (which operates in 36 states) as distinguished from a state exchange (and similar challenges are pending in other courts). This latest challenge is likely bound for the Supreme Court.

In its decision issued on July 22, 2014, the U.S. Court of Appeals for the District of Columbia invalidated the IRS regulation that provides tax credit subsidies to individuals who purchase health insurance through marketplace exchanges, whether operated by individual states or the federal government. ***Halbig v. Burwell***, No. 14-5018 (D.C. Cir. July 22, 2014). In reaching its decision, the Court relied on what it said was a plain reading of Internal Revenue Code Section 36B, promulgated by the ACA, which makes tax credits available to individuals who purchase insurance on state exchanges but makes no direct reference to the federal exchange. The Court concluded that the ACA unambiguously restricts the tax credit subsidy to insurance purchased on the state exchanges, as opposed to the federal exchange, and vacated the IRS regulation.

In contrast, the U.S Court of Appeals for the 4th Circuit unanimously came to the opposite conclusion on the same issue on the same day. ***King v. Burwell***, No.14-1158 (4th Cir. July 22, 2014). The Court determined that Section 36B is ambiguous when read in the context of the ACA as a whole and that the IRS has the authority to resolve such ambiguities. Thus, the Court upheld the IRS regulation making premium tax credits available to consumers who purchase health insurance coverage regardless of whether it is purchased through a state-run exchange or the federal exchange.

The issue of whether tax credits apply to insurance purchased through the federal exchange will need to be resolved quickly. The government has asked the full D.C. Court of Appeals to review the case *en banc* and the issue could ultimately be decided by the U.S. Supreme Court. If the decision is upheld by the Supreme Court, individuals residing in federal exchange states will no longer be eligible to receive tax credits that are passed on to insurance companies to defray the cost of insurance. In addition, fewer individuals will be subject to penalties for the failure to comply with the individual mandate because the penalty only applies if the annual cost of the least expensive available coverage, less any tax credits, exceeds 8% of projected household income. Thus, without additional changes to the ACA, there will be less incentive for individuals to comply with the individual mandate in federal exchange states. Plus, insurance companies in the 36 federal exchange states may continue to be required to comply with guarantee issue and community ratings rules but with fewer policy holders to offset such costs. Moreover, although not applicable until 2015, the penalties under the employer mandate are triggered only if an individual employee receives tax credit subsidies.

Stakeholders will anxiously await resolution of this issue which has significant repercussions for the ACA's goal of expanded healthcare coverage.

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Storming The Castle: Employee Whistleblowing Under ACA

Law360, New York (July 01, 2014, 11:34 AM ET) -- Since the title suggests a marauding horde analogy, let's get it out of the way. Across the country, part-time employees and folks classified as "independent contractors" feel like second-class citizens because they cannot enroll in their employers' health insurance plans and therefore must obtain coverage through an insurance exchange courtesy of the Affordable Care Act. Fueling this simmering rebellion, the ACA has equipped these stalwarts with formidable whistleblowing armaments and has encouraged them with vast bounties to rise up and pillage the treasuries of employers that have misclassified them. The ACA also clads these warriors in armor to protect them from employer retaliation, even if their whistleblowing accusations are wrong. Exaggeration? You decide.

Todd J. Horn

Obamacare 101

The ACA contains significant employment litigation risks — some overt, some concealed — that have little to do with the structure of health insurance plans. Although the ACA is a prototype of regulatory convolution, we will not delve into its details here. For our purposes, the following summary of the employer mandate, essentially "play or pay," and its two penalty tripwires will suffice.

First, if you are a "large employer," which means you have at least 50 full-time employees, you must offer compliant health insurance coverage to at least 70 percent of your full-time employees in 2015 and 95 percent in 2016. You need not offer coverage to your "part-time" employees (i.e., those who work less than 30 hours a week). Similarly, you need not offer coverage to your "independent contractors," since they are not your employees.

Failure to meet this 70 percent level can result in a draconian tax penalty: $2,000 per year for nearly each of your full-time employees, even those who are enrolled in your health insurance plan. This tax penalty is triggered if any one of your full-time employees obtains health insurance through an exchange and receives a tax credit or subsidy to help pay for the coverage. If you have 5,000 full-time employees, that's almost a $10 million tax penalty — a nondeductible expense.

The second tax penalty emerges when a large employer offers health insurance coverage to a sufficient number of its full-time employees, but the coverage is inadequate because it is "unaffordable" (i.e., the cost to a particular employee exceeds income thresholds) or it does not provide "minimum value" to the employee (i.e., a certain level of benefits, services or cost-sharing). This inadequate coverage tax penalty is capped at $3,000 per year for each full time-employee who secures coverage through an exchange and receives a tax credit or subsidy.

Front Line: Obamacare Whistleblowing

In addition to its health plan regulations, the ACA contains robust employee whistleblower/anti-retaliation provisions, which are found at 29 U.S.C. § 218c. Those protections are arguably the most expansive and employee-friendly of any on the books. This law broadly defines protected activity by employees, grants employees lenient burdens of proof, inflicts stringent evidentiary burdens on employers and permits significant monetary and equitable remedies to employees who prevail. Prohibited retaliation under the ACA, according to the U.S. Department of Labor, includes not only termination, but also "blacklisting, intimidating and making threats." Every employer's favorite experience — a jury trial — also is available to employees who sue.

One particularly ominous component of this law thrives in the world of part-time employee and independent contractor classification issues. In this regard, the ACA protects an employee from retaliation because she reports or is "about to" report that her employer has violated one of the ACA's provisions. In addition, the employee can complain either to her employer or the government, and she need only have a "reasonable" belief that an ACA violation occurred. You read that correctly. Employees can be protected even if they never actually complain and even if they are 100 percent wrong about whether their employer violated the ACA.

A siege under this law can unfold in infinite ways. As an example, one of your independent contractors (we'll call him "Gene") tells a co-worker that he should get company health benefits because he is managed like an employee, but has been misclassified as an independent contractor. Gene tells the co-worker that he is going to raise the issue with the company because the ACA gives him the right to enroll in employer-sponsored health insurance as an employee. A supervisor overhears this, and immediately terminates Gene's contract. There are far too many unknown variables to reach a conclusion in this scenario, but Gene's chances of prevailing in a whistleblower case increase substantially if he is, in reality, an employee under ACA standards, but has been misclassified as an independent contractor.

Big Gun: Tax Code Whistleblowing

Although formidable, the above "front line" ACA whistleblower provisions are child's play compared the risk created by the intersection of the ACA and the federal tax code. In tandem, they create the potential for seven-figure tax penalties with only a handful of part-time employee or independent contractor misclassifications. The government will pay your employees who smoke out those misclassifications.

Here's their playbook: Some companies want to reduce the amount spent on employee health insurance. One strategy to meet that goal is to structure health insurance coverage and make personnel classification decisions in a manner that barely miss the threshold for triggering the ACA's tax penalties.

As discussed above, a large employer's failure to offer compliant health insurance coverage to a sufficient number of its full-time employees can trigger a $2,000 per full-time employee tax. Let's say you have 1,200 employees: 1,100 full-time and 100 part-time. You also have 20 individuals working on various projects whom you classify as "independent contractors" or "consultants." You offer health insurance coverage to exactly 70 percent of your full-time employees (i.e., 770), and no coverage to your part-time employees or independent contractors.

No risk of the tax penalty, right? Well, don't be surprised if some of your part-time employees disagree with your belief that they only work "part-time" hours. Likewise, don't be surprised if some folks you call independent contractors think they are misclassified because they do the same jobs under the same supervision as your employees. Finally, don't be surprised if some of your part-time employees or independent contractors are upset because you exclude them from your health insurance plan.

Here's how the big gun gets loaded. Under this scenario, if you have misclassified just one employee as part-time, when in fact he works full-time under ACA standards, and that employee obtains health insurance from an exchange and receives a tax subsidy, you have failed the 70 percent coverage rule (i.e., you offered coverage to 770 full-time employees, but since you really had 1,101 full-time employees under ACA standards due to your single employee misclassification, you offered coverage to less than 70 percent of your full-time employees). The same result emerges if you have misclassified a single independent contractor who in reality is your employee. That single part-time employee or independent contractor misclassification can trigger tax penalties in excess of $2 million.

But wait, it gets worse.

The ACA requires employers to disclose to the Internal Revenue Service detailed information about its workforce and employee health insurance enrollment. Armed with this data, the IRS can assess tax penalties against employers that fail to offer compliant health insurance coverage to enough of their full-time employees. Even though the IRS may spin its wheels for years sifting through this employer data, there are mechanisms by which employees can blow the whistle on employers.

What does the "part-time" employee or independent contractor gain by reporting to the IRS that their employer dodged the ACA's tax penalty by misclassifying them? Only a pile of cash. In 2006 Congress amended the tax code to authorize payments to individuals who report businesses that fail to pay taxes owed, and the IRS established a "Whistleblower Office" to manage the process. If the complaint results in the collection of taxes or penalties that meet certain monetary thresholds, the IRS pays the whistleblower between 15 percent and 30 percent of the recovery. The hypothetical 1,100 employee company triggered the $2 million tax penalty with a single part-time misclassification, which could net the employee a $600,000 bounty for complaining to the IRS. How's that for motivation?

Strategies

Obviously, these fictionalized scenarios were purposely designed to illustrate how just one part-time employee or independent contractor misclassification could cause an avalanche of tax penalties. No employer, however, wants to be the subject of a test case to explore the parameters of this new law.

To minimize risk of exposure for part-time employee misclassifications, employers should scrutinize the manner in which they count employee hours for purposes of making part-time and full-time classifications. The ACA's rules for counting employee hours can be extremely complex, especially for employees who work flexible schedules and variable hours. You will need to learn how to count to 30 using new "ACA math."

In addition, companies should implement protocols for accurately mining their human resources information system data so they can easily validate and audit their employee classifications. In order to create a "margin of error" in the event of unintentional employee misclassifications, some employers have lowered the number of weekly hours to 20 or 25 under which an employee is considered to be "part-time" for purposes of offering coverage.

To minimize the risk that employees have been misclassified as independent contractors, employers should periodically audit the circumstances surrounding each relationship. One of the biggest risks stem from independent contractor "migration." That occurs where parties commence a true independent contractor relationship, but over time the circumstances of the relationship change and auger toward one of "employment." In addition to utilizing independent contractor agreements that set forth the terms and conditions of the relationship, employers should regularly review the degree of control exercised over the individual under IRS criteria.

Gone are the days when the ACA was merely fodder for political pundits. The complexities of the law and the litigation risks facing employers are here and the threat is real.

—By Todd J. Horn, Venable LLP

Todd Horn is a partner in Venable's Baltimore and Washington, D.C., office, where he is a member of the firm's labor and employment and health care practice groups.

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LABOR & EMPLOYMENT NEWS ALERT

May 2014

LABOR PAINS: THE $2 MILLION PART-TIME EMPLOYEE

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One of your employees (we'll call him "Don") cannot enroll in your health insurance plan because you classify him as "part-time" (one who works less than 30 hours a week). This forces Don to get health insurance through a government exchange under the Affordable Care Act – you know, "Obamacare." Furious about his exclusion from your health plan, Don "blows the whistle" with the Internal Revenue Service (IRS). Don complains that you erroneously classified him as a part-time employee, when in fact he often works more than 30 hours a week. The IRS agrees, hits your company with a multi-million dollar tax penalty based on your misclassification of Don, and then gives Don a six-figure reward for reporting you. Science fiction? Not anymore.

Embedded within the Affordable Care Act (ACA) are significant employment litigation risks that have virtually nothing to do with the structure or content of health insurance plans. For illustrative purposes, consider this highly-condensed summary of ACA: If you are a "Large Employer," which means you have at least 50 full-time employees, you must offer compliant health insurance coverage to at least 70% of your full-time employees in 2015 (95% in 2016). You need not offer coverage to your "part-time" employees – those who work less than 30 hours a week. Failure to meet this 70% level of coverage can result in a draconian tax penalty: $2,000 per year for nearly each of your full-time employees, even those who are enrolled in your health insurance plan. If you have 1,000 full-time employees, that's almost $2 million – and it is a non-deductible tax expense.

ACA also requires employers to disclose to the IRS detailed information about its workforce and employee health insurance enrollment. Armed with this data, the IRS can assess tax penalties against employers that do not offer compliant health insurance coverage to enough of their full-time employees. Even though the IRS may spin its wheels for years sifting through this quagmire of employer data, there are mechanisms by which employees can "blow the whistle" on employers, and the IRS will pay them a huge bounty if they are successful.

The $2 million part-time employee emerges like this: Let's say you have 1,200 employees – 1,100 full-time and 100 part-time. You offer health insurance coverage to ***exactly*** 70% of your full-time employees (770), and no coverage to your part-time employees. No risk of the tax penalty, right? Well, don't be surprised if some of your part-time employees disagree with your belief that they only work "part-time." In addition, don't be surprised if some of your part-time employees are upset because you exclude them from your health plan.

Here is the $2 million rub. Under this scenario, if you have misclassified just one employee as part-time, when in fact he works full-time under ACA standards, and that employee obtains health insurance from an exchange and receives a tax subsidy, you ***failed*** the 70% coverage rule. In other words, you offered coverage to 770 full-time employees, but since you really had 1,101 full-time employees under ACA standards due to your single employee misclassification, you offered coverage to less than 70% of your full-time employees. That single misclassification can trigger a tax penalty in excess of $2 million.

What does the misclassified "part-time" employee have to gain by complaining to the IRS? Just a pile of cash. In 2006, Congress amended the Tax Code to authorize payments to individuals who "blow the whistle" on businesses that fail to pay taxes owed. If the complaint results in the collection of taxes or penalties meet certain monetary thresholds, the IRS pays the whistleblower between 15% and 30% of the recovery. The hypothetical 1,100 employee company triggered a $2 million tax penalty with a single part-time misclassification, which could net the employee a $600,000 bounty for complaining to the IRS. There's your employee's (and his lawyer's) motivation.

Obviously, this fictionalized scenario was purposely designed to illustrate how just one part-time employee misclassification could cause an avalanche of tax penalties. To minimize risk of exposure, however, employers should scrutinize the manner in which they count employee hours for purposes of

making “part-time/full-time” classifications. ACA’s rules for counting employee hours can be extremely complex and byzantine, especially for employees who work flexible schedules. You will need to learn how to count to 30 using new “ACA math.” In addition, companies should implement protocols for accurately mining their HRIS data so they can easily validate and audit their employee classifications. In order to create a “margin of error” in the event of unintentional employee misclassifications, some employers have lowered the number of weekly hours (to 20 or 25) under which an employee is considered to be “part-time” for purposes of offering coverage. Litigation risks by employees under these and other provisions of ACA are no longer theoretical – the threat is real.

To find out how this law impacts your business or for assistance in updating your protocols to minimize your risk of exposure, please contact **Todd Horn**.

* * * * *

Todd Horn has over 25 years of experience in employment litigation and compliance initiatives and is the co-author of ***Maryland Employment Law***, a treatise that courts cite as a leading reference. Mr. Horn was selected as the “Lawyer of the Year” for employment law in 2011 in Maryland by the publication *Best Lawyers in America*. Mr. Horn also ranks as a top “Band 1” employment lawyer by *Chambers USA*, which reported that he “is admired as a fantastic litigator – one of the best in the courtroom, with a tremendous presence” and “is particularly sought out for high-stakes litigation.”

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March 14, 2014

THE AFFORDABLE CARE ACT AND NONPROFIT ORGANIZATIONS: AN OVERVIEW

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This article was originally published on GuideStar on March 14, 2014.

Question:

What are the implications of the Affordable Care Act (ACA) for nonprofit organizations? Are there any exceptions for employer-based insurance coverage for nonprofit organizations that struggle to provide for this financially?

Answer:

The employer health coverage mandate is designed to require "applicable large employers" including nonprofit organizations meeting this definition, either to provide employees with affordable, minimum value health coverage or to pay certain penalties for their failure to do so. Specifically, penalties are triggered if:

- (1) An employer fails to offer all of its "full-time employees" and their dependent children the opportunity to enroll in an employer-sponsored health plan; or (2) the employer-sponsored health plan offered to "full-time employees" is "unaffordable" or fails to provide "minimum value;" AND
- Any employee impacted by such a failure enrolls in health coverage and qualifies for a subsidy through an exchange.[1]

In the event that an employer becomes subject to the no coverage penalty, the employer is generally required to pay a monthly penalty of $166.67, $2,000 annually, (adjusted for inflation) multiplied by its total number of full-time employees (excluding the first 30). For purposes of this rule, "full-time employees" include those individuals working 30 or more hours per week. The IRS has issued complex proposed regulations for the purpose of identifying these individuals.

Even if an employer offers health coverage to its full-time employees (and their children), it can be subject to penalties if that coverage is deemed "unaffordable" or does not provide "minimum value." Specifically, the employer is required to pay a monthly penalty of $250, $3,000 annually, (adjusted for inflation) multiplied by the number of full-time employees who purchase health insurance through an exchange and receive a government subsidy (if income eligible). Generally, coverage is defined as "affordable" if the required employee contribution towards self-only coverage is not more than 9.5% of the employee's household income. Note that this affordability calculation does not take into account the cost of covering an employee's spouse or dependents. A plan fails to provide minimum value if the plan's share of the total allowed costs of benefits provided under the plan is less than 60% of those costs.

There are no exceptions to the employer mandate for nonprofit organizations, regardless of their financial status. However, many nonprofit organizations will be able to take advantage of the exemption from the employer mandate for small businesses. As noted above, the employer mandate only applies to "applicable large employers." An "applicable large employer" is defined as "an employer that employed an average of at least 50 full-time employees (including full-time equivalent employees) on business days during the preceding calendar year." The total number of employees for this purpose is equal to the total full-time employees for each month in the preceding calendar year; plus total number of full-time equivalent employees (calculated by totaling the hours worked by part-time employees and dividing that total by 120) for each month in the preceding calendar year; divided by 12. If the result of this calculation is less than 50, the employer is not subject to the employer mandate. One important caution—the IRS's controlled group rules apply when counting employees for this purpose. Therefore, if you nonprofit organization is related to other organizations, it is important to engage in a controlled group analysis before concluding that it is not subject to the employer mandate because it is not an

"applicable large employer."

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[1] Individuals/families with income above the Medicaid eligibility limit, but less than 400% of the federal poverty level may qualify for a subsidy. For 2013, this amount is $45,960 for an individual and $94,200 for a family of four.

* * * * *

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