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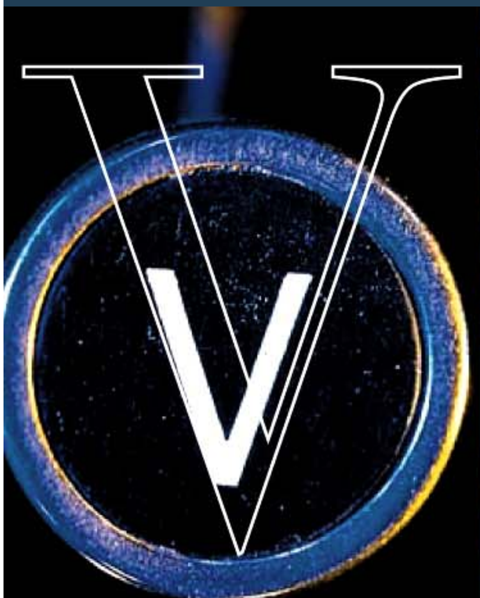
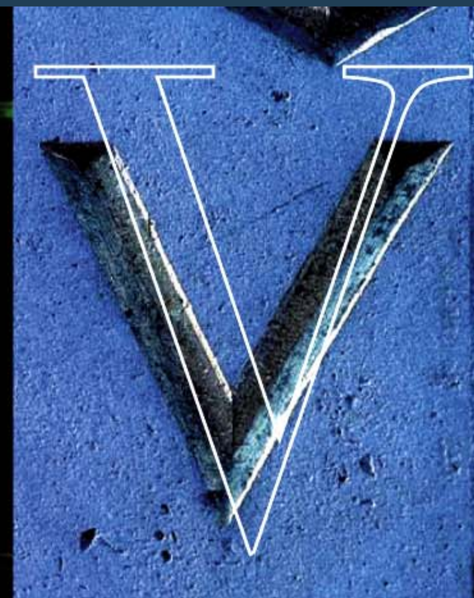
What's Ahead for 2015: Preparing Your Group Health Plan for the Employer Mandate

May 14, 2014





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Today's 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

- 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

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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

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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)

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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**

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The Mechanics of the Play-or-Pay Penalties

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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%)

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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

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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

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Identifying Full-Time Employees

- There are two measurement methods of determining “full-time” status
  - The monthly measurement method
  - The look-back measurement method

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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

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The Look-Back Measurement Method

- Safe harbor for determining if an employee = 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 = 3-12 months
- Standard Administrative Period = up to 90-day period between a standard measuring period and a corresponding stability period
- Standard Stability Period = 6-12-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)

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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)

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The Look-Back Measurement Method

- New hire reasonably expected to work 30 hours/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** = 3-12 months from date of hire
  - Overlaps with first full **Standard Measuring Period** after employment begins

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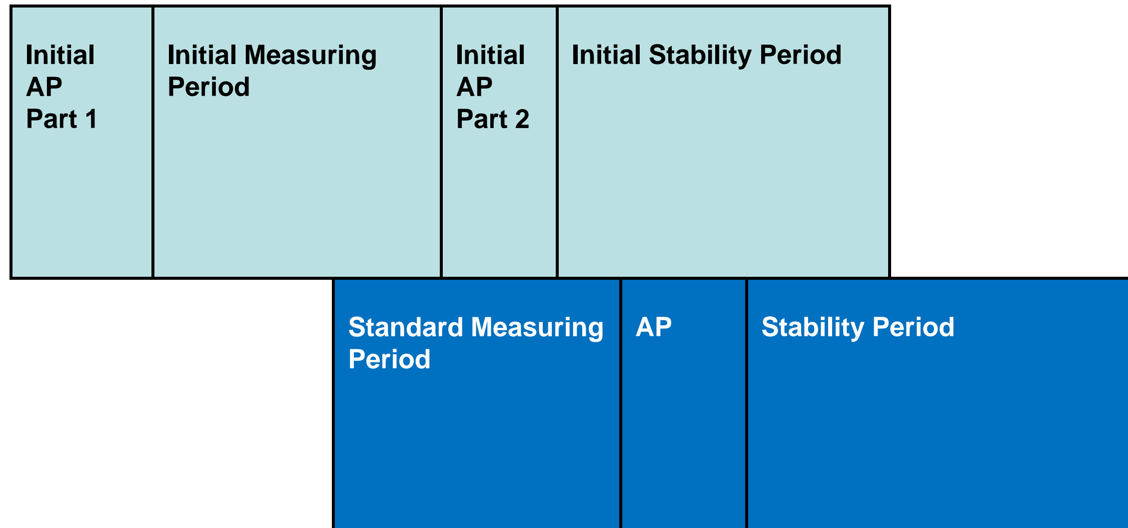
The Look-Back Measurement Method

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

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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

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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

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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

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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

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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

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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

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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
- 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 will issue forms for reporting:
  - Form 1095-C (one form for each full-time employee)
  - Form 1094-C (aggregated data for all full-time employees of the reporting entity)
  - These forms (and their instructions) will fill in gaps left in the regulations
- 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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Content of Report to IRS (Primary Method)

- 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
- For each full-time employee, months during the calendar year for which MEC was available
- 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

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Content of Report to IRS (Primary Method)

- The number of full-time employees for each month during the calendar year
- Name, address and TIN of each full-time employee during the year, and the months, if any, during which the full-time employee was covered
- Information about whether the coverage offered provides minimum value and whether spouses were eligible
- The total number of employees, by month
- Whether an employee was subject to a permissible waiting period, by month
- Whether the employer had no employees or otherwise credited any hours of service during any particular month, by month

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Content of Report to IRS (Primary Method)

- Whether the reporting employer is a member of a controlled group, and, if so, the name and EIN of each controlled group member
- Certain additional information for governmental plans, multiemployer plans and third-party reporting entities
- Any other information required by the Instructions to the Forms 1094-C and 1095-C (to be determined)

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Timing of Report to IRS

- Must be filed by March 31 following the calendar year, if filed electronically
- Must be filed by February 28 following the calendar year, if filed on paper

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Statement to Participant (Primary Method)

- Must provide a Form 1095-C to each full-time employee reported to the IRS
- Statement must include all of the information reported to the IRS with respect to such full-time employee
- Must provide the statement by January 31 following the calendar year to which it pertains. An extension of 30 days may be granted (but is not automatic) upon a showing of good cause.

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Alternative Reporting Methods

- 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

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Alternative Reporting Methods

- Method #1: “Qualifying Offers”
  - Each full-time employee who received a “qualifying offer” for all 12 months in the calendar year is eligible to be reported using an abbreviated Form 1095-C (details to be published by IRS)
  - Other full-time employees (who did not receive “qualifying offers”) are reported using the “primary method”

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Alternative Reporting Methods

- 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
  - Reporting employer provides a simplified statement to each full-time employee (in a format to be determined by the IRS) regarding eligibility for the premium tax credit
  - Reporting employer files an abbreviated Form 1095-C with the IRS (further details to be provided by the IRS)

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Alternative Reporting Methods

- 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 the 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

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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

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Subsidies Offered Through the 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

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Subsidies Offered Through the 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

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Enrollment in the 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
  - The final Exchange regulations enumerate nine (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 the authority to develop additional special enrollment periods

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Enrollment in the 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 the 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

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Interaction with the 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"

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Employee Retaliation and Other Litigation Risks under the Affordable Care Act

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Imagine if you will….

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

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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?

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General Overview – 29 U.S.C § 218c

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

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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

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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

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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

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Retaliation Prohibited

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

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Retaliation Prohibited – How Far?

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

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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

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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

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Retaliation – Penalty Avoidance

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

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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

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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 prohibited (OSHA fact sheet)

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Retaliation Prohibited – Section 218c

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

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Enforcement Proceedings

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

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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

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Next Steps

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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

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