

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

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

Venable LLP, Washington, DC

Panelists

Thora A. Johnson, Esq., Venable LLP

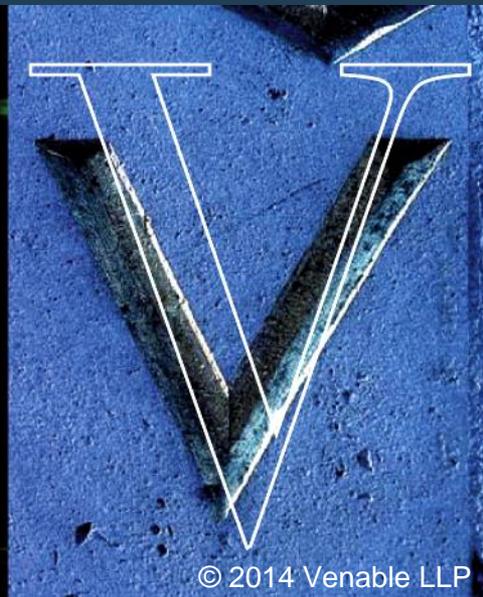
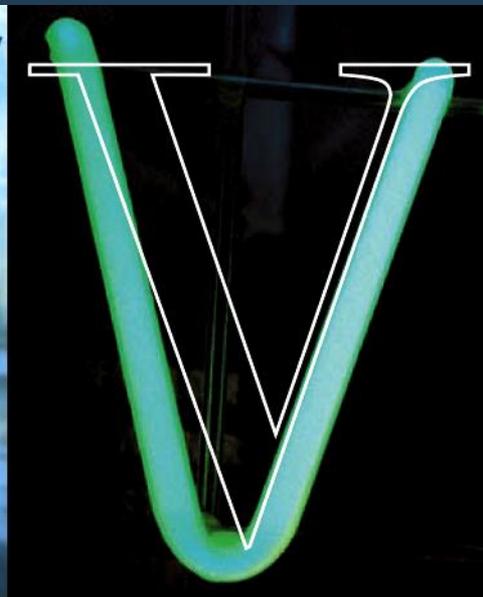
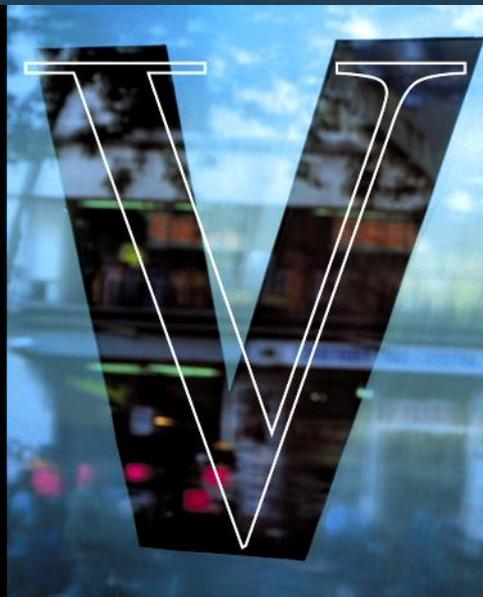
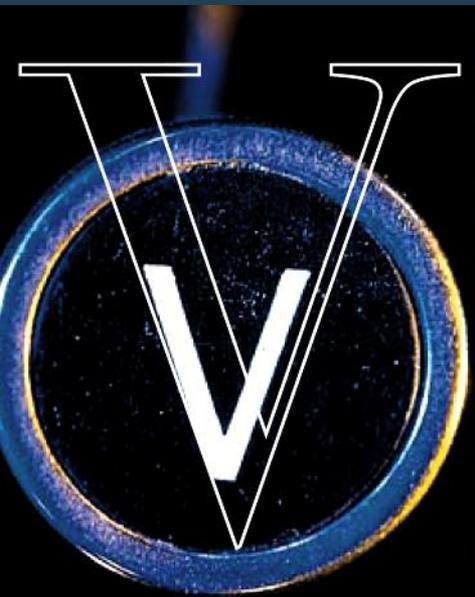
Harry I. Atlas, Esq., Venable LLP

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

Todd J. Horn, Esq. Venable LLP

Moderator

Jeffrey S. Tenenbaum, Esq., Venable LLP





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# Upcoming Venable Nonprofit Events

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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



# Introduction to the Play-or-Pay Rules

# 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%)***



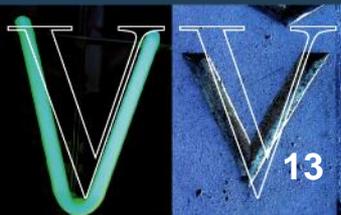
# The “No Coverage” Penalty

- 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



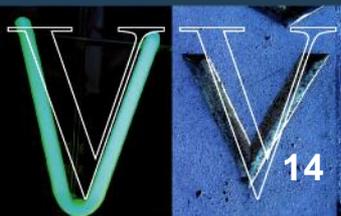
# Identifying Full-Time Employees

- 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



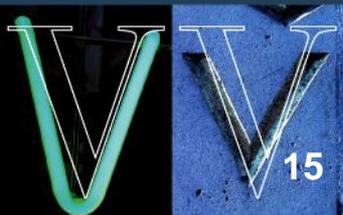
# Identifying Full-Time Employees

- 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**



# The Look-Back Measurement Method

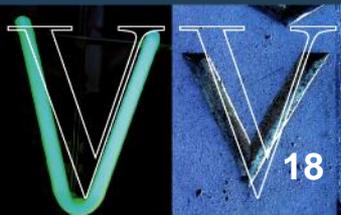
- **Standard Measuring Period** = 3 to 12 months
- **Standard Administrative Period** = Up to 90-day period between a standard measuring period and a corresponding stability period
- **Standard Stability Period** = 6- to 12-month period immediately following the standard measuring period (and any applicable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



# The Look-Back Measurement Method

## Ongoing Testing of Employees

<p><b>Standard Measuring Period 1</b> (11/1/13-10/31/14)</p>	<p><b>Administrative Period 1</b> (11/1/14-12/31/14)</p>	<p><b>Stability Period 1</b> (1/1/15-12/31/15)</p>		
		<p><b>Standard Measuring Period 2</b> (11/1/14-10/31/15)</p>	<p><b>Administrative Period 2</b> (11/1/15-12/31/15)</p>	<p><b>Stability Period 2</b> (1/1/16-12/31/16)</p>



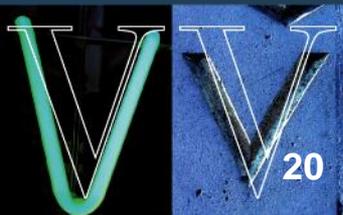
# The Look-Back Measurement Method

- 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)



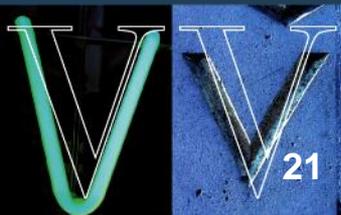
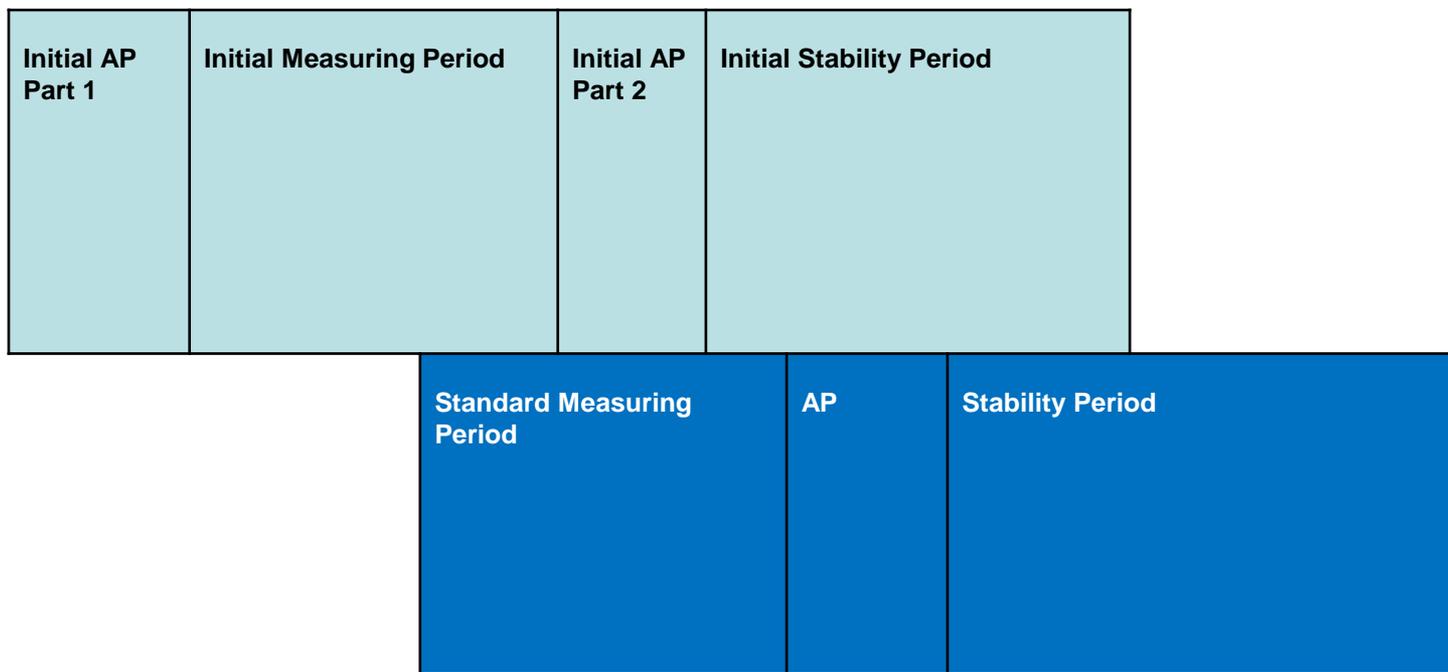
# The Look-Back Measurement Method

- 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



# The Look-Back Measurement Method

## Testing for New Variable Hour Employees



# 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



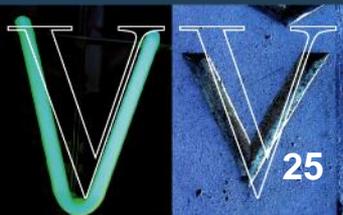
# Determining Which Method to Use

- 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





# Reporting of Coverage to IRS and Participants

**Harry I. Atlas**  
**Venable LLP**

# 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



# 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



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/1095c](http://www.irs.gov/1095c).

VOID

CORRECTED

600115

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			<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
18			<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
19			<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
20			<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
21			<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
22			<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

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.



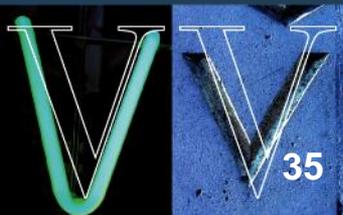
# IRS Form 1095-C (for each employee)

- 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

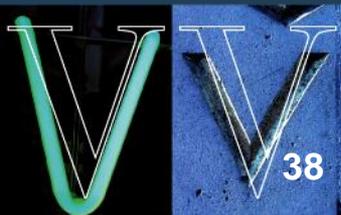
- Method #1: “Qualifying Offers”
  - Coverage offer to one or more full-time employees
  - Offer covers all months in the calendar year for which the individual was a full-time employee (except months for which there is a Section 4980H penalty exemption)
  - Coverage provides minimum value
  - Employee 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



DRAFT AS OF  
July 24, 2014  
DO NOT FILE

Form **1094-C**

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

CORRECTED

20115  
OMB No. 1545-0047

**2014**

Department of the Treasury  
Internal Revenue Service

Information about Form 1094-C and its separate instructions is at [www.irs.gov/1094c](http://www.irs.gov/1094c).

**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?  Yes  No  
If "No," do not complete Part IV.

**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)



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	<input type="checkbox"/>	<input type="checkbox"/>			<input type="checkbox"/>	
24	Jan	<input type="checkbox"/>	<input type="checkbox"/>			<input type="checkbox"/>	
25	Feb	<input type="checkbox"/>	<input type="checkbox"/>			<input type="checkbox"/>	
26	Mar	<input type="checkbox"/>	<input type="checkbox"/>			<input type="checkbox"/>	
27	Apr	<input type="checkbox"/>	<input type="checkbox"/>			<input type="checkbox"/>	
28	May	<input type="checkbox"/>	<input type="checkbox"/>			<input type="checkbox"/>	
29	June	<input type="checkbox"/>	<input type="checkbox"/>			<input type="checkbox"/>	
30	July	<input type="checkbox"/>	<input type="checkbox"/>			<input type="checkbox"/>	
31	Aug	<input type="checkbox"/>	<input type="checkbox"/>			<input type="checkbox"/>	
32	Sept	<input type="checkbox"/>	<input type="checkbox"/>			<input type="checkbox"/>	
33	Oct	<input type="checkbox"/>	<input type="checkbox"/>			<input type="checkbox"/>	
34	Nov	<input type="checkbox"/>	<input type="checkbox"/>			<input type="checkbox"/>	
35	Dec	<input type="checkbox"/>	<input type="checkbox"/>			<input type="checkbox"/>	

Form 1094-C (2014)



Form 1094-C (2014)

**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).

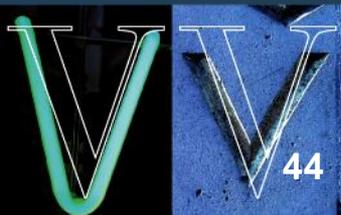
Name	EIN	Name	EIN
36		51	
37		52	
38		53	
39		54	
40		55	
41		56	
42		57	
43		58	
44		59	
45		60	
46		61	
47		62	
48		63	
49		64	
50		65	

Form 1094-C (2014)



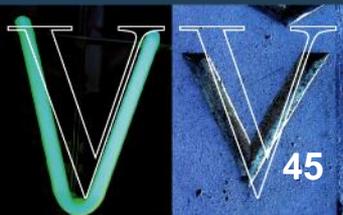
# Form 1094-C (IRS Transmittal Form)

- 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



# **Interaction with the Exchanges**

**Christopher E. Condeluci**

**CC Law & Policy**

# 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



# 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



# 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



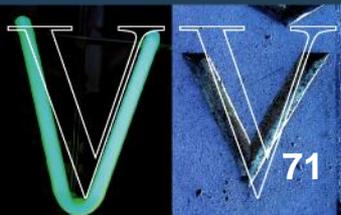
## Retaliation – Section 218c

- 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?



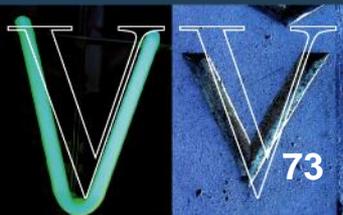
# Enforcement Proceedings

- 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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