Evaluating Your Nonprofit's Options under the *Affordable Care Act*: The Pros and Cons of Health Insurance Alternatives for Your Employees

Tuesday, July 23, 2013, 12:30 p.m. – 2:00 p.m. EDT
Venable LLP, Washington, DC

Moderator:
Jeffrey S. Tenenbaum, Esq., Venable LLP

Panelists:
Anita F. Baker, CPA, CEBS, CliftonLarsonAllen LLP
Thora A. Johnson, Esq., Venable LLP
Christopher E. Condeluci, Esq., Venable LLP

VENABLE® LLP

Upcoming Venable Nonprofit Legal Events

August 8, 2013 – The Road Map to HIPAA Compliance: What Your Nonprofit Needs to Know

August 21, 2013 – The IRS Final Report on Nonprofit Colleges and Universities: Lessons for All Tax-Exempt Organizations

September 18, 2013 – Keeping Up with Technology and the Law: What Your Nonprofit Should Know about Apps, the Cloud, Information Security, and Electronic Contracting

VENABLE® LLP

Agenda

- Introduction
- ACA Exchanges
- Shared Responsibility Requirement (A.K.A. the "Employer Mandate") for Large Nonprofit Employers
- Important Changes for Small Nonprofit Employers
- Additional Requirements for Small and Large Nonprofit Employers
- Alternative Strategies for Small and Large Nonprofit Employers: "Private" Exchanges

VENABLE® LLP

ACA Exchanges

The Exchange & Congressional Intent

- The original intent of the Exchange created under PPACA was not to deliver the subsidies, but rather to serve as a *marketplace*
  - It was believed that the Exchange would reduce administrative costs
  - In addition, it was believed that the Exchange would attract multiple insurance carriers, which would promote competition
  - Achieving these two goals could translate into lower premiums
- Early on in the drafting process, it was "private" exchanges that served as the model, not the Massachusetts Connector

VENABLE LLP

Two Kinds of "ACA" Exchanges

- State-based Exchanges
  - The drafters never envisioned the level of resistance to the law and establishing an Exchange
- Federal Exchange (which includes the Federal-State Partnership)
  - Congress intended the "Federally-facilitated Exchange" to step into the shoes of the State-based Exchange and perform all of the same functions
  - Unsurprisingly, the statute is not "clean," and therefore, questions have arisen
    - Can a Federal Exchange deliver the premium subsidies?

What Should You Know About the "ACA" Exchanges?

- Initially, the Exchanges will service (1) individuals and families in the individual market and (2) employees of small employer
  - In 2017, a State may elect to permit the sale of fully-insured large group plans through the Exchange, but a State is not required to do so
- An Exchange may be structured as (1) a governmental agency or (2) an independent nonprofit entity

VENABLE LLP

What Should You Know About the "ACA" Exchanges? (cont'd.)

- The Exchange is directed to perform specific functions
  - For example, determine eligibility for an advance-refundable tax credit for health insurance and cost-sharing subsidy (i.e., premium subsidies), establish and maintain a web site, and set up a call center to field questions from consumers
- The statute also gives States the authority to permit their Exchanges to prohibit carriers from offering a plan through the Exchange
  - This is known as the "active purchaser" model
  - To date, 7 States have an "active purchaser" Exchange

VENABLE LLP

The Subsidies Offered Through the "ACA" Exchange

- 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 go to the Exchange and access the subsidies
- 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 (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

The Exchanges & The Premium Subsidies: Impact on Employers

- ***Behavioral Changes***
  - Small employers may drop coverage because (1) they can get out of the "health care game" and (2) a majority of their employees will likely get a better financial deal as long as the premium subsidies are available
  - Although large employers are NOT likely to drop coverage immediately, their employees may want the premium subsidies because (1) they may get a better financial deal as long as the premium subsidies are available and/or (2) the "family glitch" issue
- ***Verification Process***
  - If and when employees seek to access a premium subsidy, a verification process will be triggered which will require the employer to communicate with the Exchange in some way (e.g., establish an "electronic data source" that the Exchange may access or receive phone calls from the Exchange directly, attempting to verify plan information for purposes of determining subsidy eligibility)
- ***Election to Sell Fully-Insured Large Group Plans***
  - Beginning in 2017, a State may elect to permit the sale of large group fully-insured plans through the Exchange
  - Upon an election, the adjusted community rating rules would apply and it is likely that many of the other minimum standards (e.g., the requirement to provide the "essential health benefits" and the single risk pool rules) will apply

VENABLE® LLP

Shared Responsibility Requirement (a.k.a. the "Employer Mandate") for Large Nonprofit Employers

The “Employer Mandate”

- 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) on business days during the preceding calendar year.”
  - Common law test used for identifying employees

VENABLE® LLP

- Total number of employees for this purpose =
  - Total full-time employees for each month in the preceding calendar year; PLUS total number of FTEs for each month in the preceding calendar year; DIVIDED BY 12
  - If the result is not a whole number → round to the next lowest number
  - This calculation includes seasonal employees, but if employer can show that total employee count exceeds 50 (due to seasonal employees) no greater than 4 months during the prior year → mandate does not apply

VENABLE LLP

The "Employer Mandate"

- An employer with 50 or more "full-time equivalent" (FTE) employees would be subject to a penalty tax if:
  - The employer is NOT offering health coverage to at least 95% of its full-time employees and their child dependent(s) (under age 26)
    - This is known as the "No-Coverage" penalty = $2,000 x all "full-time" employees (minus 30)
  - The employer offers coverage, but the coverage (1) is "unaffordable" (i.e., the required *employee* contribution for self-only coverage exceeds 9.5% of, for example, the employee's household income or some other "safe harbor" benchmark) 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)
    - This is known as the "Sub-Standard Plan" penalty = $3,000 x each "full-time" employee that accesses a premium subsidy
- The penalty tax is ***only*** triggered if the employee purchases health insurance through the Exchange and accesses the premium subsidy
- While effective January 1, 2014, the enforcement of the employer mandate was recently delayed for one year

“Employer Mandate” Penalties Delayed Until 2015

- What does delay mean for large employers?
  - Do not need to offer full-time employees and their dependent children health insurance coverage in 2014
    - No penalties if employer offers no coverage
  - No penalties if coverage offered is “unaffordable” or does not provide “minimum value” in 2014
  - Do not have to file an information return with IRS in 2014
    - Further guidance from IRS on information return is expected to be issued summer 2014

"Employer Mandate" Penalties Delayed Until 2015 (cont'd.)

- What are some of the implications of delay?
  - More employees will be eligible for the premium subsidies
    - Little incentive for employers to change their plan designs to satisfy the new requirements in 2014, which means more employees will (1) not be offered an employer plan or (2) not be offered "affordable, minimum value" coverage
  - Employer/Employee relations issues when employees are forced back on to their employer plan
    - In 2014, an employee may pay as little as 2% of income for health insurance (because the Federal government picks up the rest of cost)
    - But, in 2015, the employee may be required to pay 9.5% of income for an employer plan (because the employer offers an "affordable" plan); AND, the employee will NOT be eligible for a subsidy

VENABLE LLP

Penalty Strategy Components

- Defining full-time employees
  - Optional look-back measurement period
  - Capping hours to reduce #s of FT employees
  - Impact of FTEs waived on bottom line
- Employee wage level
  - Implications of over/under 400% FPL
- Minimum value and affordability
  - Where is best place to spend benefit dollars (e.g., premiums, HRA/HSA contributions, etc.)?
  - Employer contribution level: Is it advantageous to make coverage less affordable?

VENABLE LLP

Identifying Full-time Employees: 2014 & Beyond

- Employee engaged in average of 30 "hours of service" per week or 130 hours in a month.
  - Uses common law definition of employee
    - Does not include: leased employees, sole proprietors, partners in partnership, 2% S-corp shareholder
  - Hours of service = hours worked and hours paid but for which no work was performed (e.g., PTO, FMLA, deployment leaves, disability, etc.)
  - Salaried workers use actual hours, or 8 hours/day or 40 hours per week standard.
  - Special rules for employees of educational institutions
  - Seasonal workers: If 120 days or fewer, or 4 calendar months of work, then excluded from calculation of large employer

Safe Harbors: Full-time Employees

- IRS Notice 2012-58 and Dec. 2012 IRS/HHS proposed regulations explain a method employers may use to determine full-time status for ongoing employees, new employees expected to work full-time, and variable hour and seasonal workers.

  - **Measurement period**: 3-12 months (employer determined)
  - **Administrative period (optional)**: Up to 90 days for employee eligibility for coverage determinations, notification and enrollment of employees
  - **Stability period**: The greater of 6 months or the duration of the standard measurement period

Defining Which Employees Are Full-time

Strategies

- Select measurement and corresponding stability period to capture fewest number of full-time employees.
- **Limit employee hours** of service to less than 30 hours/week or 130 hours per month.
- If not offering ESI, **limit full-time status to 30** or fewer employees across businesses

Why is this important?

- Employers must **offer** to full-time employees and their children under age 26 health insurance coverage or pay a penalty.
- Penalties are assessed for full-time employees only
- Current FT employees who waive coverage may enroll in ESI in 2015 adding bottom line, non-penalty costs to employers.
- Now is the time to make strategic decisions to limit penalty risk

VENABLE LLP

"Minimum Value" Plan

- Law requires "large" employer to **offer** at least one plan with a minimum 60% actuarial value
  - Desired by employees in order to meet individual mandate = New Benefit Floor
  - Premiums for this level plan should be lower than higher actuarial value plans
- IRS to make Actuarial Value calculators available to employers and plans
- Actuarial Value looks at a variety of components: deductibles, co-payments, co-insurance, as well as employer contributions to HRAs and HSAs.

60% Actuarial Value: On average the plan pays for 60% of the costs for covered benefits and enrollees; on average, pay the remaining 40% through cost-sharing such as deductibles, copayments and coinsurance.

Three Employer Affordability Safe Harbors: W-2 Safe Harbor

IRS Notice 2012-58

- If employee's premium cost for **self-only coverage is less than 9.5% of their W-2 wages** for the employer, the health insurance is considered affordable *AND*
  - The employer will **not** pay a penalty for that employee
  - The employee may still be eligible for premium tax credits in the Exchange based upon Modified Adjusted Gross Income of Household.
  - Employer is **not** subject to penalty if employee receives tax credit but later employer-sponsored insurance is determined to be affordable.
  - **Affordability for related individuals**: Employers don't need to make coverage affordable for dependents (e.g. family coverage, employee+1)

VENABLE LLP

Affordability Safe Harbors: W-2 (cont'd.)

- Using total amount of wages = Box 1 of Form W-2
  - Box 1 does not include employee elective deferrals
- Can include wages paid to employees by a third party that are reported on the W-2 and reflecting the 3rd party EIN
- Determined at the end of calendar year on per employee basis using the year's W-2 reportable (e.g., compare 2014 premium cost to 2014 Box 1 W-2 wages)
- Could be used prospectively to set employee contribution level to < 9.5% of wages

Affordability Safe Harbors: FPL

December 2012 Proposed Regulations

- Coverage considered affordable for calendar month if employee's required contribution for lowest-cost self-only coverage that provides minimum value under plan does not exceed 9.5% of Federal Poverty Level (FPL)
  - Determined by calculating FPL for single individual (where individual is employed) for applicable calendar year
  - Divided by 12
  - 2013 FPL for a single person = $11,490
    - 9.5% of $11, 490 = $1091.55/year or $90.96/month

Affordability Safe Harbors: Rate of Pay

December 2012 Proposed Regulations

- Coverage considered affordable for calendar month if employee's required contribution for month for lowest cost, self-only coverage provides minimum value does not exceed 9.5% of a Rate of Pay Safe Harbor Amount
  - **Rate of Pay Safe Harbor Amount** = 130 hours multiplied by employee's hourly rate of pay as of the first day of the coverage period (generally first day of plan year)
  - Salaried employees use monthly salary instead of hourly rate of pay
- Available as long as employer does not reduce hourly rate of pay or monthly wages during calendar year

VENABLE® LLP

Important Changes for Small Nonprofit Employers

VENABLE LLP

Definition of "Small Employer"

- Beginning in 2016, "small employer" will be defined as 1 to 100 employees
  - This means that a State's small group insurance market will be defined as 1 to 100
- Congress decided to phase in this new definition by allowing States to elect to maintain their current definition of 1 (or 2) to 50 until 2016
  - Every State has elected to maintain its current definition of small group
- Why is this important?
  - Because if an employer currently employs, for example, 75 employees, this employer will be part of the State's large group market
  - In 2016, however, this same employer will now be part of the State's small group market

VENABLE® LLP

Small Group Market Insurance Reforms: The Five Pillars

VENABLE LLP

PILLAR #1 – "Essential Health Benefits"

- Statute said all fully-insured small group plans must cover 10 enumerated *medical services*
  - Ambulatory patient services; Emergency services; Hospitalization; Maternity and newborn care; Mental health and substance use disorder services, including behavioral health treatment; Prescription drugs; Rehabilitative and habilitative services and devices; Laboratory services; and Preventive and wellness services and chronic disease management
- HHS gave States the ability to establish an "essential health benefits" benchmark plan
  - In general, the benchmark plan is the plan with the largest enrollment in the State's small group market
  - In general, the benchmark plan will include the 10 enumerated medical services, but if a benchmark plan does not, HHS requires the State to add the benefit coverage
  - State mandated benefits in place as of 12/31/11 may be considered an "essential health benefit"

VENABLE LLP

PILLAR #2 – "Metal Levels" of Coverage

- All fully-insured small group plans must meet a specified actuarial value (AV) +/- 2% (bronze plan – 60% AV, silver plan – 70% AV, gold plan – 80% AV, platinum plan – 90% AV)
- In its simplest form, AV is a measure of the co-insurance under the plan
  - For example, the insurance coverage pays for 60% of the cost of a covered benefit and the insured is responsible for paying for the remaining 40% of the cost

PILLAR #3 – Cost-Sharing Limitations

- The aggregate amount spent on deductibles, co-payments, and co-insurance cannot exceed the maximum out-of-pocket limits for a high-deductible health plan defined under the health savings account ("HSA") rules for 2014
- In addition, small group plans must limit the annual deductible to no more than $2,000 for single coverage and $4,000 for family coverage
  - However, recent HHS guidance permits an insurance company to increase these deductible amounts if doing so would allow the plan to meet specified AV
  - This new guidance gives insurance companies and small employers more flexibility in designing a plan

VENABLE® LLP

PILLAR #4 – Premium Rating Rules

- Insurance companies are prohibited from setting premiums based on any employee's health status
- Premium rates may only vary by:
  - Age (but by no more than a 3 to 1 ratio),
  - Tobacco use (but by no more than a 1.5 to 1 ratio),
  - Single or family coverage, and
  - Rating area

PILLAR #5 – Risk Pooling

- All employees of small employers in the small group market are treated as a single risk pool (pooled by insurance company) regardless of where coverage is obtained
  - In other words, health risks inside and outside of the SHOP Exchange will be pooled together (e.g., an individual that purchases a plan through the SHOP Exchange will be part of the same risk pool of an insurance company that sells a health plan to an individual outside of the Exchange)

VENABLE® LLP

Additional Requirements for Small and Large Nonprofit Employers

VENABLE® LLP

Eligibility for Health Insurance Exchange Notice

- Employers to notify employees upon effective date and/or date of hire:
  - Information about the existence of state/federal exchange, services offered and how to contact
  - Employee **may** be eligible for assistance to purchase insurance via the Exchange
  - Employee loses eligibility for employer contribution to health benefits if purchases insurance via the Exchange
- **Effective Date:** For current employees, employers must issue notices prior to October 1, 2013. For employees hired after this date, the notice must be provided upon hire.

Eligibility for Health Insurance Exchange Notice (cont'd.)

- Notice of coverage options must be provided to each employee, regardless of plan enrollment status (if applicable) or of part-time/full-time status
- Department of Labor has model notice language available on its website
  - Employers who offer a health plan: http://www.dol.gov/ebsa/pdf/FLSAwithplans.pdf
  - Employers who do not offer a health plan: http://www.dol.gov/ebsa/pdf/FLSAwithoutplans.pdf

New Health Insurance Marketplace Coverage Options and Your Health Coverage

Form Approved
OMB No. 1210-0149
(expires 11-30-2013)

PART A: General Information

When key parts of the health care law take effect in 2014, there will be a new way to buy health insurance: the Health Insurance Marketplace. To assist you as you evaluate options for you and your family, this notice provides some basic information about the new Marketplace and employment-based health coverage offered by your employer.

What is the Health Insurance Marketplace?

The Marketplace is designed to help you find health insurance that meets your needs and fits your budget. The Marketplace offers "one-stop shopping" to find and compare private health insurance options. You may also be eligible for a new kind of tax credit that lowers your monthly premium right away. Open enrollment for health insurance coverage through the Marketplace begins in October 2013 for coverage starting as early as January 1, 2014.

Can I Save Money on my Health Insurance Premiums in the Marketplace?

You may qualify to save money and lower your monthly premium, but only if your employer does not offer coverage, or

VENABLE® LLP

6056 Information Returns

- Employers subject to the "employer mandate" must provide an information return to (1) the IRS and (2) each of its full-time employees by January 31 of the year following the year health coverage was required to be provided
- The information that must be reported includes:
  - The name, address, and EIN of the employer
  - A certification that the employer is or is not offering health insurance coverage to its employees
  - The number of full-time employees
  - The name, address, and TIN of each full-time employee and the number of months (if any) during which the employee (and any dependents) was covered under the plan
- If an employer certifies that it is indeed offering health coverage, the employer must also report:
  - The length of any waiting period under the plan
  - The months during which coverage was available
  - The premiums for the lowest cost plan offered by the employer
  - The amounts the employer contributes toward its employees' premiums

90-Day Waiting Period: Newly Hired, Full-time Employees

- Beginning January 1, 2014, an employer's waiting period for insurance generally cannot exceed 90 days
  - IRS Notice 2012-59 provided guidance on 90-day waiting limitation (Public Health Service Act § 2708)
- Newly hired, full-time employees
  - If employee is reasonably expected to be full-time, then must be eligible to enroll within 90 days of start date
    - Not permitted to wait until the 1st of the month after 90 days
    - May require employers to allow mid-month enrollment or participate well before 90 days have passed

Additional Health Plan Fees/Taxes

Comparative Effectiveness Research Plan Fee (2012)

- Effective for plan years ending on or after 10/1/2012
- Requires health insurance and self-insured plans (employer) to pay a per participant fee
- Fee
  - Year 1: $1/participant
  - Year 2: $2/participant
  - Due by 7/31/2013
  - 2014: Inflation adjusted rate
  - 9/30/2019: Phased out

Filed on Form 720

Transitional Reinsurance Fee (2014)

- Third-party administrators pay on behalf of the plan
  - Remit annual contributions to support reinsurance payments to issuers
    - $63 per covered employee and their dependents in 2014
    - Phases out: $42 in 2015; $26 in 2016
    - First quarterly payment due 1/15/15

Additional Health Plan Fees/Taxes

Health Insurance Industry Tax (HIT) (2014)

- Fee assessed on fully-insured health plans in the individual and small group market
- Tax is a fixed dollar amount assessed based upon insurer's net premiums
  - Nonprofits only pay the tax on 50% of net premiums
  - Plans receiving > 80% of revenues from public programs for the poor, elderly & disabled are exempt from the tax

Cadillac Plan Tax (2018)

- 40% excise tax assessed on health insurer or plan administrator offering "high-cost" health coverage
  - "High cost" = annual premium
    - > $10,200 single coverage
    - > $27,500 family coverage
- Tax would be on premiums above the thresholds
- Goal is to generate revenue to help pay for coverage for the uninsured and to make the most expensive plans less attractive.

VENABLE® LLP

Alternative Strategies for Small and Large Nonprofit Employers: "Private" Exchanges

VENABLE LLP

What Is a "Private" Exchange?

- At its core, a private exchange is a private business – typically operated by insurance brokers, benefit consultants, or insurers – that sells insurance products to health care consumers through an electronic platform
- What makes private exchanges unique is their ability to enable the health care consumer to shop from among a wide variety of major medical health plans and supplemental insurance products through the use of creative, interactive technology
- Private exchanges offer:
  - The use of defined contribution/fixed contribution funding for group health plans
  - Expanded choice
  - Decision support (e.g., "recommendation technology")
  - End-to-end transactional services

VENABLE LLP

Private Exchange Models

- ***Group Market Private Exchange:*** A private exchange that sells "group" health insurance to employees of employers (i.e., employer-sponsored health insurance)
  - Large Employer Private Exchange – This model primarily targets employers with 2,500 or more employees
  - Small- to Mid-Sized Employer Private Exchange – This model targets groups as small as 1 and as large as 2,500 employees
- ***Individual Market Private Exchange:*** A private exchange that sells health insurance to individuals and families in the individual market *outside* of the ACA Exchange
- ***Web-Based Entity ("WBE"):*** A WBE can be considered a private exchange platform that helps a consumer purchase a "qualified health plan" ("QHP") offered through a State-based or Federally-facilitated marketplace

Group Market Private Exchange: Defined Contribution/Fixed Contribution

- What is a defined contribution/fixed contribution funding?
  - Under a defined contribution/fixed contribution funding model, the employer makes fixed contributions that employees may use to purchase a "defined benefit"
    - This defined benefit is the underlying health plan, which in 2014, will meet all of the ACA requirements
- Advantages?
    - Employers can better manage their costs by deciding how much they want to spend on health insurance each year
    - Then, the employer may determine the rate at which the fixed contribution would increase each year (e.g., based on increases in the Consumer Price Index ("CPI"))

VENABLE LLP

Group Market Private Exchange: Expanded "Employee Choice"

- A private exchange enables the employee to shop from among a wide variety of major medical health insurance products with varying plan designs
  - This includes offering up to 10 to 20 different major medical health plans, ranging from high-cost sharing plans down to low- or no-cost-sharing plans or plans with narrow networks with a cost differential of up to 60%
  - Offering this "inventory" promotes choice and consumerism, which has been proven to reduce health care spending and improve customer satisfaction
- Offering a wide variety of major medical plans is a departure from the current model
- Group market private exchanges will also offer a wide menu of ancillary/supplemental products

VENABLE LLP

Group Market Private Exchange: Decision Support

- A sophisticated decision support system helps employees determine what major medical health plan or health insurance package is best for them to purchase
  - "Recommendation technology"
    - The employee is asked a series of questions about, among other things, the consumer's expectations of care utilization (such as pregnancy or prescription drug use), along with the employee's risk tolerance, financial position, and the amount of an employer subsidy
    - The technology synthesizes the answers to these questions, develops a personalized "profile," and recommends a plan or an insurance package that may best fit the employee's needs

VENABLE® LLP

The Future?

- Are private exchanges the future?
  - As health care costs continue to rise, more and more individuals and employers are likely to look to private exchanges
    - Why? Because private exchanges provide a consumer-friendly way to purchase health insurance
  - In the case of employers, it is likely that private exchanges will help those employers who want to hold on to employer-sponsored coverage to continue to provide such coverage
    - Why? Because (1) employers can better manage costs, (2) employees are able to choose their health insurance as opposed to employers deciding on plan options every year, and (3) the customer service found only in a private exchange
- Even if PPACA is modified or halted due to a shift in politics, private exchanges will play a critical role in the future of health care

VENABLE® LLP

Questions?

Jeffrey S. Tenenbaum, Esq.
jstenenbaum@Venable.com
t 202.344.8138

Anita F. Baker, CPA, CEBS
anita.baker@cliftonlarsonallen.com
t 602.604.3563

Thora A. Johnson, Esq.
tajohnson@Venable.com
t 410.244.7747

Christopher E. Condeluci, Esq.
cecondeluci@Venable.com
t 202.344.4231

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