Speakers

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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
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
  - The monthly measurement method
  - 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 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

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<th>Measuring Period</th>
<th>Administrative Period</th>
<th>Stability Period</th>
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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)
## The Look-Back Measurement Method

### Ongoing Testing of Employees

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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)
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
The Look-Back Measurement Method

Testing for New Variable Hour Employees

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<th>Initial AP Part 2</th>
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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
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
- 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 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
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
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
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)
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
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.
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
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”
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)
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
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 Condeluci
Venable LLP
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
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
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
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
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
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”
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 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?
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 an 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 employee 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 prohibited (OSHA fact sheet)
Retaliation Prohibited – Section 218c

- Open issue – Will reducing an employee’s hours before he received 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
Next Steps

Lisa A. Tavares
Venable LLP
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
contact information

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