The Affordable Care Act: An Update on the Employer Mandate

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Health Care Reform Framework

- Health insurance reforms
- Expanded Medicaid eligibility
- Care delivery reforms/experiments
- Individual insurance coverage mandate
  - Premium tax credits
  - Penalties for non-insured
- Employer responsibilities
  - Tax credit incentives for small employers
  - Penalties for non-insured employees in certain large employers
- Medicare payment reforms
HCR Implementation Timeline

- **2014**
  - Health insurance exchanges open for small businesses and individuals
  - Employer mandate/penalties originally scheduled to begin (delayed until 1/1/15)
  - Minimum benefit package mandate begins
  - Individual mandate begins

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Employer Mandate Timeline Revisions

- **January 1, 2015-December 31, 2015**
  - Businesses with 100 or more full time and full time equivalent employees
    - Requires 75% of full time employees to be offered qualified health insurance or face penalties
    - Exemption of 80 full time employees from penalty calculation
  - Businesses with 50-99 full time and full time equivalent employees are exempt from penalties
    - CERTIFICATION REQUIRED

- **January 1, 2016 and on**
  - All businesses with 50 or more full time and full time equivalent employees subject to mandate
    - Requires 95% of full time employees to be offered qualified health insurance or face penalties
    - Exemption of 30 full time employees from penalty calculation
Small Business Tax Credit

- Began April 2010
- IRS notice to businesses
- Eligibility
  - <25 FTEs
  - Employer covers at least 50% of insurance cost
  - Average annual wage below $50,000
  - For-profit and nonprofit firms can qualify
- Amount
  - Up to 35% of premium costs in 2010 (25% for nonprofits)
  - Increases to 50/35% in 2014
  - Phase-out based on wage level and size of firm
- Claiming Credit
  - Form 8941
  - 990-T also for tax-exempt employers

Individual Mandate

- Individual insurance mandate for “minimum essential coverage”
- Phased-in penalty
  - 2014: greater of $95 or 1% of income
  - 2015: greater of $325 or 2% of income
  - 2016: greater of $695 or 2.5% ($2085 for families)
  - Later: cost of living adjustment in amounts
- Exemptions for financial hardship, religious objections, American Indians, and more
- “Cadillac plan” tax hits in 2018
Minimum Essential Coverage

- Essential Benefits
- Must at least include:
  - Ambulatory care
  - Emergency services
  - Hospitalization
  - Maternity and newborn care
  - Mental health and substance abuse disorder services
  - Prescription drugs
  - Rehabilitative and habilitative services and devices
  - Laboratory services
  - Preventive and wellness care
  - Chronic disease management
  - Pediatric services including vision and dental

- States can exceed floor benefits
- Grandfathered plans excepted

Minimum Essential Coverage

- Minimum Value
  - Employer plans must equal at least 60% of actuarial value of plan pay out
  - Employer-sponsored plans not required to offer all the essential benefits/ benefits outside parameters taken into account
Minimum Essential Coverage

- Affordability
  - 9.5% of modified adjusted gross income as relating to a self-only policy
  - Cost sharing limits ($5950 individual/ $11,900 family

Grandfathered Plans

- In existence on March 23, 2010
- Includes group, self-insured, and individual plans
- Certain changes in plan may lose protected status
  - Eliminating a benefit to diagnose or treat a particular condition
  - Changing insurers
  - Cost-sharing requirements
  - Contribution rates
Employer Requirements and Penalties

- Small employers (less than 50 FTEs)
- Large employers (more than 50 FTEs) with health insurance
- Large employers without health insurance
- Very large (more than 200 FTEs) employers with health insurance
- NOTE: number of FTEs relates to employer classification; number of full-time employees affects penalty calculation

ACA Employer Mandate: All Home Care Sectors

- No mandate for insurance coverage
- Small business tax credit (25 or less FTEs/$50k wage average)
- Automatic enrollment where employer offers plan, 200+ FTEs (employee can opt out)
- Free choice voucher to enroll in Exchange for certain low income employees
- FTEs=120 hours per month
- Full-time employee = 30 or more hours per week/130 hours per month
- Penalties
  - More than 50 full-time employees w/o insurance with at least one full-time employee getting premium tax credit--$2000 per full-time employee
  - Exclude first 30 of 50+ full-time employees in penalty calculation
  - More than 50 employees, insurance offered, with at least one full-time employee getting premium tax credit--lesser of $3000 per employee getting credit or $2000 per full-time employee
  - Penalty adjusted for inflation
  - Exempt employers with less than 50 full-time employees
**Employer Mandate: Home Care Impact**

- Many, but not all HHAs have comprehensive health insurance
  - $3000 per non-insured penalty a risk
- Most Medicaid home care providers do not have health insurance for employees
  - $2000 per full-time penalty a risk
- Private pay home care companies rarely have employee health insurance
  - $2000 per full-time penalty a virtual certainty

**Employer Mandate: Options**

- Stay below 50 Full-time employees
  - Corporate re-organization to break up large companies into multiple small ones
- Limit the number of employees at 30 hours or more per week
- Seek higher Medicaid rates (good luck!)
- Raises charges to clients (tough sell)
**Employer Mandate: Reform Needed**

- Options for reform:
  - Delay the effective date
  - Exempt home care employers
    - Penalty is dollar trading between government programs
    - Elderly and disabled cannot afford higher care costs
  - Require government programs to increase payment rates to cover ACA costs
  - Automatic Medicaid eligibility for home care workers and employer penalty exemption
  - Tax credits for private pay clients
  - Delay creates some breathing room and springboard for reforms

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**Employer Mandate: Game Plan**

- Involve Congress, White House, IRS, HHS/CMS
- Impact survey
- Draft legislative options
- Separate Medicaid strategy
- Gain allies
  - State Medicaid programs
  - Senior/disability advocacy groups
  - Worker representatives
- Introduction of legislation/regulation
2015 Transition Relief

- Employer mandate delayed until 2016 for employers of 50-99 full-time employees, including FTEs
  - Applies into 2016 for non-calendar year plans that begin in 2015
- Employers with 100+ full-time employees, including FTEs get partial relief
  - Offer of insurance reduced to 70% standard in 2015, down from 95%
  - Penalty calculation excludes first 80 full-time employees
- Transition relief applies only to 2015 (at this time)

Who Is Your Employee?

- IRS standard (20 factor test)
  - Control is the key, but not only factor
- IRS rule suggests that home care services may have consumer as sole employer
- Misclassification of workers has no safe harbor
  - Section 530 does not apply
  - Home care often presents at least a joint employer status
Counting FTEs to Determine Employer Classification

- FTE equals 30 or more hours per week
- Part-time employees hours combined converted to FTE equivalents
- Seasonal employees treatment
- Home care complications due to varied work hours/ per visit pay
- Bona fide volunteers do not count
- On-call hours subject to a “reasonable” method

Small Employers

- Less than 50 FTEs
- Exempt from employer mandate and employer penalty provisions of HCR
- Employers with less than 25 FTEs may qualify for credit
Large Employer Determination

- Employed an average of at least 50 full-time employees taking into account FTEs on business days during the preceding calendar year
- Common law standard on “employee”
- Leased employees = “employee”
- Sole proprietor, partner in a partnership, 2% S corporation shareholder not an employee unless otherwise an employee
- Transition relief for 2014 allows shorter look-back period (6-months)

Large Employer Determination

- Entity aggregation
  - Multiple entities treated as a single employer under IRS law (414(b), (c), (m), or (o))
  - i.e. a controlled group
  - Government and church-owned entities need further guidance on aggregation (good faith standard)
- Predecessor employers are included
- New employers: “reasonable expectation” standard
- Seasonal workers: Not a “large employer” if 50+ for 120 days or fewer in year
Large Employer Determination

- Full-Time Equivalent Employees (FTEs)
  - Applies only to employer size determination
  - Includes non-full time employees
- Monthly calculation
  - Aggregate number of hours, but no more than 120 for any employee
  - Divided by 120
  - Equals number of FTEs in month
  - Monthly totals divided by 12 = total FTEs
  - Monthly fractions counted

FTE example

- Part-time employees have 1260 hours in the aggregate in the month
  - Equals 9.7 FTEs for that month
- Part-time employees have 2000 hours in the aggregate in the month
  - Equals 15.4 FTEs for that month
- Add all monthly FTEs and divide by 12 to determine the number of FTEs that are part of the “full-time” calculation for “large employer” calculation
Large Employer Determination

Full-Time Employee Identification

- Employed an average of 30 hours or more per week/130 hours per month
- “hours” includes actual hours worked and hours paid, e.g. vacation, sick leave, PTO
- Non-hourly employees
  - Actual hours worked and/or paid;
  - Days-worked equivalency (eight hours); or
  - Weeks worked equivalency (40 hours)
- May use different methods for different worker classes
- 130 hours in month = 30 hours per week
- Look-back method or monthly measurement method

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Large Employer Determination

Full-time employee calculation

- Full-time employees (130 hours) each month divided by 12 + total FTEs = Total “full-time employees”
Large Employer Penalties

- **4980H(a) liability**
  - Large employer does not offer qualified insurance to employee and dependents
  - At least one employee qualifies for premium tax credit or cost-sharing reduction
  - $2000/12 for each full-time employee for a given calendar month

- **4980H(b) liability**
  - Large employer offers insurance
  - $3000/12 for each full-time employee that qualifies for subsidy

**Employer Options**

- Calculate penalty on a monthly basis in the year in which the penalty would apply
  - Difficult predictability
  - Monthly variations

- Optional “look-back” measurement method safe harbor
Look-Back Measurement Method

- Allows employer to calculate the number of “full-time employees” based on a look-back period in the preceding calendar year

- Measurement period
  - A defined time period of not less than 3 but no more than 12 months, e.g. 1/1/13 to 12/31/13
  - Period is chosen by employer

- Stability period
  - Immediately follows measurement period and any administrative period
  - Greater of 6 months or length of measurement period, e.g. 1/1/14 to 12/31/14

- Periods must be uniform for employees except
  - Separate collective bargaining units
  - Collective bargained employees and non-collectively bargained
  - Salaried and hourly employees
  - Employees in different states
  - Methods can change in subsequent years; cannot change once started
Measurement Period: Transition Relief

- Measurement period may be shorter than 12 months, but no less than 6 months
- Beginning no later than 7/1/13 and ending no earlier than 90 days before the first day of the plan year
- Example: calendar year plan; measurement period 4/15/13 through 10/14/13; followed by administrative period (optional) ending 12/31/13

Large Employers

- Penalty for Not Offering Coverage
  - When any employee receives a premium credit toward their exchange plan
    - Persons not eligible for Medicaid
    - Generally incomes 138% to 400% of Federal Poverty Level
  - Monthly penalty assessment
  - Equal to number of Full-time minus 30 X 1/12 of $2000
  - Note: No penalty if no full-time employee qualifies for credit
Look-Back Measurement Method:
Counting Employees

- **New Employees**
  - New full-time: reasonably expected to work 30+ hours weekly at start date
  - New variable hour and seasonal employees: 30+ hours is expected to be of limited duration
    - Reasonable, good faith interpretation
    - Stability period can vary depending on whether variable hour/seasonal employee is considered full time
    - Change of employment status special rules

- **Rehired employees**
  - “new” if rehired after 26 weeks
  - Rule of parity option if less than 26 weeks

- **Continuing employees**
  - Short-Term employees: <3 months
  - Temporary staffing agencies under consideration

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Large Employer Not Offering Coverage Penalty

- **Example**
  - 40 full time employees
  - 40 PT employees working 70 hours each per month
  - Assume same each month
  - \(40 + 21.5\) monthly (40 pt X 70 hrs per month/ 130 = 21.5)
  - Add monthly full-time and FTEs divide by 12 (disregard summed fractions) 40 + 21.5
  - Total 62 full-time employees (includes FTEs) for month= “large employer”

  - 1 full time employee receives credit
  - Penalty: \((40-30) \times 2000 / 12 = 1666.67\) per month
Large Employers Offering Coverage

- **Offer to employee and dependents**
  - 90 day max waiting period
  - When any employee receives a premium credit toward their exchange plan
    - Persons not eligible for Medicaid
    - Generally incomes 138% to 400% of Federal Poverty Level
  - Monthly penalty assessment
  - Equal to lesser of $3000 per subsidized employee and number of full-time employees minus 30 X 1/12 of $2000
  - Note: No penalty if no full time employee qualifies for credit
  - Note: No penalty in 2014 if employer takes steps to including dependents but does not finalize in time

Large Employer Offering Coverage Penalty

- **Example**
  - 75 Full-time employees (including FTEs)= “large employer”
  - 55 Full-time employees
  - 10 full-time employees receive subsidy/credit
  - Penalty is lesser of:
    - $10 \times $3000 = $30,000/12 = $2500 monthly
    - (55-30) \times $2000 = $50,000/12 = $4167 monthly
Employee Subsidy/Credit

- HHS to establish process for certification of subsidy/credit
- Will apply IRS methods
- Expect employer notice

Offering Coverage

- To employee and dependents
  - Children under 26
  - Spouse not included
- Offer for “the month”
- 95% standard (margin for error)
- General substantiation and recordkeeping requirements on offer
- Effective opportunity to accept or decline if not minimum value or affordable
- Employee non-payment of premium = “offered” coverage
Affordable Coverage

- Employee contribution for insurance on self only does not exceed 9.5% of household income
- Affordability Safe Harbors
  - W-2 (Box 1 reported wages)
    - End of calendar year; employee specific
    - Adjusted for partial years
  - Rate of Pay
    - Hourly pay X 130 hours
    - Monthly salary
    - Federal Poverty Line

Assessable Penalty

- Opportunity to rebut penalty prior to collection
  - Based on whether an employee qualifies for subsidy/credit
- Payable upon notice and demand by IRS
- Penalty is not tax deductible as a business expense
Very Large Employers Offering Coverage

- 200+ FTEs
- With qualified health plan
- Must auto-enroll all Full-time employees
- Employee may opt out

Miscellaneous

- **Waiting Periods**
  - Penalties increase where employer has longer than 90 day waiting period for insurance enrollment

- **Vouchers**
  - If employee household income below 400% FPL and insurance premium between 8% and 9.8% of household income employer must offer a voucher equal to employer contribution
  - Purchase through exchange
Insurance Exchanges

- Established by states or federal government in 2014
- Available only to individuals and businesses with up to 50 employees for first two years
- Beginning in 2017, state can open to businesses with more than 100 employees

Employer Reporting Requirements

- “Offering Employer”
  - Report to IRS and FTE employee
  - Name, address, and employer ID number
  - Certification as to whether there is an offer to enroll
  - Number of FTEs monthly
  - Name, address, and taxpayer ID of FTE employees
  - Number of months any FTEs and dependents covered under employer plan
- Employers with opportunity to enroll in “minimum essential coverage”
  - Length of waiting period
  - Months coverage available
  - Monthly premium for lowest cost plan
  - Employer's share of plan cost
  - The plan option where the employer pays the largest share of cost
Resources

- www.irs.gov
- www.dol.gov
- IRS final rule: https://www.federalregister.gov/articles/2014/02/12/2014-03082/shared-responsibility-for-employers-regarding-health-coverage