



# Health Care Reform

## Final Employer “Pay or Play” Rules

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# Speakers



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## For Discussion

- New IRS guidance and effective dates
- Determining large employer status
- Pay or Play penalties
- Measuring full-time employees
- Special rules and transition relief

## New IRS Guidance

- Final Regulations: Employer Shared Responsibility Rules, February 12, 2014 (79 Fed. Reg. 8544)
- IRS FAQs – Employer Shared Responsibility  
<http://www.irs.gov/uac/Newsroom/Questions-and-Answers-on-Employer-Shared-Responsibility-Provisions-Under-the-Affordable-Care-Act>
- Still to come: final regulations on annual information reporting

# Talk to Your Lawyer

- This presentation is a general discussion of the Pay or Play rules based on the recently issued final IRS regulations.
- It is not intended to be legal advice.
- Each entity's situation will differ and the facts for each entity will determine your particular situation. These rules are very complex and need to be applied with knowledge of your particular situation.

# Summary Overview – Final Regulations

- Finalize proposed regulations published in early 2013
- Largely retain the structure and scope of the proposed regulations and earlier guidance, but with many revisions and clarifications
- Further delay implementation to 2016 for some “smaller” employers
- Replace the 95% rule (relating to offers of coverage for full-time employees and dependents) with a 70% rule for 2015 ONLY
- Reduce the maximum “pay or play” penalty for 2015 ONLY
- Retain optional “look-back” measurement period for determining full-time employees
- Provide special rules and important transition relief
- Unfortunately, complexity remains

# Keep Your Eye On the Big Picture – Take a Deep Breath and Don't Panic

- Most of the IRS changes were in the very detailed rules—so we will be discussing a lot of detail
- **But—most important is to start, or hopefully continue, to review your healthcare program in light of your overall business strategy**
- The best way to deal with the new rules may differ depending on your industry, your workforce, your risk tolerance, your culture—you need to understand the rules but also think about what makes sense in your situation
- After we talk about the transition rules, you may want to look again at what you think your risk of triggering either of the two levels of penalties is for 2015, as well as in 2016 and later
- Continue to work with your team on steps to prepare for compliance as of 1/1/15 (or 1/1/16 for less than 100 employees); you may have some new ideas to explore after today's session



# Effective Dates

# Pay or Play Effective Dates

- Proposed regulations (January 2013) – pay or play rules originally effective January 1, 2014
- Notice 2013-45 (July 2013) – one year “reprieve” for all affected employers – delay to January 1, 2015
- Final IRS regulations published on February 12, 2014
  - Additional one-year “reprieve” for employers with 50-99 full-time equivalent employees – now effective January 1, 2016, but special conditions apply to take advantage of delay
  - For large employers with 100+ full-time equivalent employees – still effective January 1, 2015
  - Special transition rule for non-calendar year plans

# Employers with Fewer than 100 FTEs

- Additional one-year implementation delay for employers with 50-99 full-time equivalent employees – must comply effective January 1, 2016
- Special conditions apply for relief
  - Must base measurement of FTEs on 2014 data
  - Beginning February 9, 2014 through December 31, 2014, the employer may not reduce the hours or size of the workforce to take advantage of the delay (workforce reductions for bona fide business reasons not included)
  - Must not eliminate or materially reduce the coverage offered as of February 9, 2014 (special rules about what it means to not “eliminate or materially reduce” coverage)
  - Required certification that conditions are met – to be provided to the IRS on a yet-to-be-published form as part of the new reporting requirements

# Large Employer Status

## Pay or Play Affects “Large” Employers

- Every large employer – public, private, nonprofit.
- Large employer for current calendar year if in prior calendar year period, averaged at least 50 “full-time” employees (or full-time equivalents – FTEs).
  - Special transition 2014 “look-back” period for determining 2015 status (any consecutive 6-month period, if desired)
- Common law definition of employee applies (excludes leased employees, independent contractors, sole proprietors, partners, and 2% S corporation shareholders). No Section 530 relief. Common law definition hard to apply.

# Large Employers

- General rule: Full time = avg. at least 30 hours of service per week or 130 hours of service per month (part-time employee is anything less)
- Must count all hours of service for which employee is paid or entitled to pay including for paid time off (e.g., vacation, sick etc. – no limit)
- Final regulations provide clarifications for employers not in existence in prior year
- Special rule for “seasonal workers”

# Special Rule for “Seasonal Workers”

- General rule – seasonal workers are taken into account for purposes of determining large employer status
- Who is a “seasonal worker”?
  - Workers who perform labor or services on a “seasonal basis”
  - Retail workers employed exclusively during “holiday seasons” (final regulations intentionally do not indicate specific holidays or length of holiday season)
  - Employers can apply a reasonable good faith interpretation of that term to define who is a “seasonal worker” for determining large employer status
- If you have 50+ FTEs for 120 days or less during the previous year only because you counted seasonal workers, not “large employer” for the current calendar year

# Controlled Groups

- Whether an employer is “large” is determined by aggregating all controlled group members
  - Guidance for government employers reserved in final rule (can apply reasonable good faith interpretation)
- But the penalties are determined member organization-by-member organization, which can limit risk and cost
- Example: parent and subsidiary together are “large”
  - Subsidiary does not offer minimum essential coverage to 95% of its full-time employees
  - Penalty is calculated on subsidiary’s full-time employees only
  - If employee is FT for both parent and subsidiary for a month, penalty liability attaches to member for whom employee has greatest number of hours (if hours equal, members choose or else IRS will)
  - Parent’s offer of qualifying coverage to subsidiary’s employees works for subsidiary



# Pay or Play Penalties

# Penalty A Basics: Failure to Offer Penalty

- Employer fails to offer 95% (70% in 2015 only) of its full-time employees and their dependents group health coverage that provides “minimum essential coverage,” and
- Receives certification that at least one full-time employee is enrolled in an Exchange AND eligible for a federal subsidy
- **PENALTY**
  - \$2,000 X [the number of full-time employees less the first 30 (80 in 2015 only)]
  - First 30 (80 in 2015 only) employees are disregarded for purposes of calculating the tax
  - Penalty amount adjusted for inflation beginning 2015

# Who is a Dependent?

- Son, daughter, adopted child, or child placed for adoption – up to age 26
- Final regulations:
  - remove stepchildren and foster children from definition
  - exclude children who are not U.S. citizens or nationals, unless a resident of U.S., Canada, or Mexico
  - confirm that the term dependent does not include a spouse
  - clarify that a child is “dependent” through the end of the month he or she turns age 26
- Employers may rely on the employee’s representation about children and their ages

# What is Minimum Essential Coverage?

- Group health coverage provided by an employer to its employees
- Very broad – excludes HIPAA excepted benefits such as certain stand-alone dental and vision policies or salary reduction only health FSAs
- Note: stand-alone HRAs no longer viable under health care reform, because by design they do not comply with the market reforms (e.g., prohibition on annual and lifetime limits)
  - Possible \$100 per day, per affected individual penalty for noncompliance

## Penalty A: 2016 Example

- Large Employer fails to provide minimum essential coverage to 95% of its full-time employees (and dependents), and receives certification that at least one full-time employee is enrolled in an Exchange and qualifies for federal assistance
- In 2016, employer has 1000 full-time and 20 part-time employees
- Penalty does not apply to part-timers or first 30 full-timers

**Penalty = \$1,940,000 (\$2,000\* X 970)**

*\*as adjusted for inflation*

# Penalty B Basics: Inadequate or Unaffordable Coverage

- Employer offers 95% of its full-time employees (and their dependents) minimum essential coverage, but coverage does not provide minimum value or is unaffordable, and
- Receives certification that at least one full-time employee is enrolled in an Exchange and eligible for a federal subsidy
- **PENALTY** – the lesser of:
  - \$3,000 X [the number of full-time employees receiving federal assistance], or
  - the amount calculated under Penalty A
  - Penalty amount adjusted for inflation beginning 2015

# Penalty B: Minimum Value

- Minimum-value test
  - Plan does not provide minimum value if it covers less than 60% of benefit costs
  - Methodologies
    - Minimum value calculator
    - Design-based safe harbor checklists
    - Actuarial certification

## Penalty B: Affordability

- General rule: “affordable” if employee contribution for self-only coverage of the employer’s lowest cost plan that provides minimum value does not exceed 9.5% of employee’s household income
- Final regulations still provide three safe harbor methods under which employers can test the 9.5% to determine affordability, and also provide new clarifications



# Penalty B: Affordability Safe Harbors

## Safe Harbor #1: Employee's W-2 wages

- For full-year offers of coverage, 9.5% of the amount that is equal to W-2 Box 1 wages determined after the end of the calendar year on an employee-by-employee basis
- Required employee contribution for coverage during the year must remain consistent amount or percentage of W-2 wages – no employer discretionary adjustments to contributions permitted
- New: special adjustments for partial-year offers of coverage

# Penalty B: Affordability Safe Harbors

## Safe Harbor #2: Rate of Pay

- Hourly Employees
  - For each month, compare employee contribution to 9.5% of the amount that is equal to 130 hours multiplied by the lower of (a) the employee's hourly rate of pay as of the first day of the coverage period (generally the first day of the plan year), or (b) the employee's lowest hourly rate of pay during the calendar month
- Non-Hourly Employees
  - For each month, compare employee contribution to 9.5% of amount that is equal to employee's monthly salary as of the first day of the coverage period
  - If monthly salary is reduced (including due to a reduction in work hours), the employer cannot use this safe harbor method

# Penalty B: Affordability Safe Harbors

## Safe Harbor #3: Federal Poverty Line

- 9.5% of amount that is equal to the federal poverty line for a single individual for the calendar year divided by 12

## Penalty B: 2016 Example

- Large Employer provides minimum essential coverage that doesn't meet minimum value or affordability tests, and receives certification that at least one full-time employee is enrolled in an Exchange and qualifies for federal subsidies
- In 2016, Large Employer offers coverage to 1000 full-time employees, of whom 20 enroll in Exchange and receive a federal subsidy

**Penalty = lesser of**  
**\$60,000 ( $\$3,000^* \times 20$ )**  
**or  $\$1,940,000$  ( $\$2,000^* \times 970$ )**

*\*as adjusted for inflation*

# Overriding Rule Re “Pay”

- If none of your employees gets a subsidy from an Exchange, no penalties are due
  - If one employee gets a subsidy – proper or not – the IRS will contact you (procedures still to come)
  - IRS clarified that contact will not occur until after the due date for employees to file their individual tax returns for that year and after the due date for large employers to file information returns identifying FT employees and coverage
  - Be prepared for the IRS, whatever your circumstances
  - There will be errors by the Exchange and IRS
  - Records are your best defense!

# Who Can Get a Subsidy?

- Subsidy available if:
  - you have household income between 100% and 400% of the federal poverty line
    - 2 person family – income up to \$62,920 (2014)
    - 4 person family – income up to \$95,400
    - 6 person family – income up to \$127,880
  - you are not eligible for Medicaid (or other government-sponsored programs like CHIP)
  - you are not eligible for employer-provided coverage or are eligible for employer-provided coverage, but it is not of minimum value or affordable

# Penalties Enforced by the IRS

- Annual report by each employer to IRS
- Annual information to each FT employee
- Information by Exchange to IRS
  - IRS will use as basis for penalties
  - You can challenge, but you need good records
- Proposed rules for reporting requirements issued September 2013 – still awaiting final rules (expected soon)

# Measuring Full-Time



# Determining Full-Time Status for Offer of Coverage and Related Penalties

- ACA focus is on full-time employees
- Full time (FT) = avg. at least 30 hours of service per week or 130 hours of service per month (part-time is anything less)
- Final rules provide two methods for determining full-time status: the monthly measurement method and the look-back measurement method
- Pro and cons of each method

# Determining Full-Time – Monthly Measurement Method

- Based on hours worked each month
- If you use monthly measurement method, employees can flip in and out of full-time and requirement to be offered coverage
- If insured, would need to coordinate with carrier on issues with this method
- New rules allow calculation based on optional weekly rule, using successive one-week periods applied consistently
- Under this method you aren't burdened with providing coverage during the stability periods where person may no longer be FT, but must deal with monthly enrollments

# Determining Full-Time – Look-Back Measurement Method

- Average of 30 hours/week or 130 hours/month
- You choose the period over which averaged
  - One month
  - Longer (3 – 12 months)
- If you choose one month look-back period, employees can flip in and out of full-time and requirement for offer of coverage – if insured, may need to discuss with carrier
- The longer period you use to average the longer the subsequent coverage period has to be

# Determining Full-Time – Look-Back Measurement Method

- Employees who are reasonably expected to be FT at hire should be treated as FT and offered coverage within first 3 months
- Special rules for temporary staffing firms in determining whether employees would be expected to be full-time
- For new non FT employees with variable hours, determine status using initial look-back “measurement period” of three to 12 months—very complex rules—more later

## Determining Full-Time – Non-Hourly

- For non-hourly employees can use days-worked (8 hr day) or weeks-worked (40 hr week) equivalency or count actual hours worked
- Can change methods each year for different categories of non-hourly workers as long as reasonable and consistently applied
- A general anti-abuse rule added to final rules – cannot use equivalency if would cause understatement of hours for a substantial number of employees (e.g. actually work 3 10-hour days per week)

## Determining Full-Time – Hourly

- For hourly, must count hours – cannot use equivalency method
- Generally, must count all hours of service for which employee is paid or entitled to pay, including paid time off (e.g., vacation, sick etc. – no limit)
- BUT – new special rules where hours of service may not count for certain categories
  - Volunteers
  - Student employees
  - Members of religious orders

# Determining Full-Time – Difficult Tracking Situations

- Further guidance will be issued for employers with employees in categories where hours are particularly challenging to track
  - Adjunct faculty
  - Layover hours for airline employees and others
  - On-call hours
- In the meantime, use reasonable method for crediting hours consistent with IRS rules
- Must count hours of service with related employers

## General 3 Month Exemption

- No coverage must be offered until the conclusion of the employee's first 3 calendar months of employment to avoid penalty.
- Note: This is not the same time period as the 90-day limit on waiting period for coverage under the ACA market reform rules. New guidance was just issued on this requirement, which has a different penalty for non-compliance.



# Determining FT If You Choose the Look-Back Method

- Average over what period you choose
  - One month
  - Longer (“lookback” period)
- What is the effect of measuring over a period longer than one month?
- How does measurement period fit with open enrollment?
- What do you measure?

# Measurement & Stability Periods

- If you measure FT over 3-12 months, the period chosen is a “measurement period” or MP
- Each MP has a corresponding “stability period” or “SP” for offering coverage
  - Even if the employee is not FT in the SP, coverage must be offered in that SP
- MPs 6 months or less must have SPs of 6 months
- MPs longer than 6 months must have equal SPs
- May have differing MPs and SPs for salaried versus hourly, different states, represented and non-represented, separate bargaining units, and different large employers within a controlled group

## Simple MP and SP examples

- The MP is 3 months so the following SP is 6 months
- The MP is 5 months so the SP is 6 months
- The MP is 9 months so the SP is 9 months
- The MP is 12 months so the SP is 12 months

# Measurement and Administration

- If the period of coverage immediately followed the MP, there would be no time to
  - Notify the employee of coverage availability
  - Let the employee make health care elections
  - Implement payroll changes for premium deductions
- An “administrative period” or “AP” is available before coverage must be offered
  - Up to 90 days after the end of the MP (but watch initial period for variable/seasonal/part-time)
  - Can fit with open enrollment

## Example – 12 Month MP

- You choose 12 months for administrative simplicity
  - Fits with one open enrollment per year
  - If 6 months, could need 2 open enrollments/year
- MP (measure) Oct 15 – Oct 14
- AP (administration) Oct 15 – Dec 31
- SP (coverage) Jan 1 – Dec 31

# 12 Month MP Effects

- One period to measure
- One open enrollment for on-going employees
- Any employee who is FT as of Oct 15 (based on prior MP) is FT for the next Jan 1 – Dec 31 regardless of any change in actual hours

# Payroll Periods

- The MP rules work in “months”
- But you can use payroll periods (one week, two weeks or semi-monthly) to measure hours
- **Complicated description:** Start with the first payroll period that includes the first day in the MP and end w/ the last payroll period that ends prior to the last day in the MP, or start with the first payroll period that follows the payroll period that includes the first day in the MP and ends on the last day of the payroll period that includes the date of the last day of the MP
  - Example: If using calendar year, could exclude the entire payroll period that included Jan. 1<sup>st</sup> if included the entire payroll period that included Dec. 31<sup>st</sup> or, alternatively, could exclude the entire payroll period that included Dec. 31<sup>st</sup> if included the entire payroll period including Jan. 1<sup>st</sup>

# New Hires and FT

- If “reasonably expect” that new hire will be 30 hours/week then must offer coverage within 3 months
- If do not “reasonably expect” will be FT, then variable employee rules apply
- Facts that show “reasonably expect”
  - Determination is based on facts and circumstances. Factors to consider include, but no limited to, whether replacing someone who was or was not FT, the extent to which same or comparable positions are FT, whether job was advertised or in job description or offer letter as requiring an average of 30 or more hours of service per week
  - Special rules for educational organizations prevent taking expected breaks into account in determining expected FT status



## **New Hire – Not FT (Variable, Seasonal and Part-Time)**

- Variable—not sure how many hours the person will work
- Seasonal is customary annual recurring employment of 6 months or less
- Final rules also include a definition of Part-Time—where hired with reasonable expectation that will work less than 30 hours per week
- But the same rules for measuring hours apply for Variable, Seasonal and Part-Time

## New Hire – Not FT (Variable Hour, Part-time or Seasonal)

- Need to determine if average 30 hours/week
- Use new hire initial MP, not the “standard” MP
  - Choose MP (at least 3 mos; not more than 12) (need not be calendar months, e.g. March 15-April 14; can use payroll periods)
  - Start MP no later than first of month after hire or the first day of payroll period that starts after date of hire
  - Establish SP, no less than 6 mos (must be calendar months)
  - May use AP after MP – but time prior to initial MP plus time prior to offer of coverage cannot be more than 90 days total
  - Shift to standard MP, SP after one full standard MP has passed (new rule – if gap, extend first SP until reach first standard SP)

# Re-Hires

- A re-hire may be treated as a new employee if
  - There are 13 consecutive weeks of no hours/service (remains 26 weeks for educational institutions), or
  - Optional rule of parity: A break in service is at least 4 weeks long and is longer than the immediately preceding period of service (e.g., 6 weeks of service, 7 weeks of break)
- If not “new,” then the individual’s MP and SP periods pre-break continue to apply as if there was no break

# Defending Your Full-Time Employee Determinations

- Recordkeeping is crucial
- Very complex rules (e.g. not always the same service rules as ERISA; tracking of breaks for rehires, etc.)
- Will need good records to defend your status determinations – there will be audits

# Special Rules and Transition Guidance

## Special Transition Rules

- For 2015, can determine large employer status over an at least 6 consecutive month period, rather than the entire 2014 calendar year.
- MP for 2015 – may use 12 month SP and 6 month MP but must start MP by July 1, 2014.
- For 2015 only, can avoid penalty if coverage is offered no later than the first day of the first payroll period that begins in January 2015. After transition, must be covered for entire month or treated as not covered.
- Do not have to cover kids for 2015; only need to “take steps” in 2015 to establish coverage – unless the plan already offered coverage in 2013 or 2014.

# Newly Large Employers

- Not in existence in preceding year – cannot be in existence on any business day in the year. If so, coverage in current year based on reasonably expected number of employees.
- Final rules provide that if employee not offered coverage at any time during prior calendar year because employer was not an applicable large employer in prior year, must offer coverage on or before April 1 of the first year become a large employer in order to avoid penalty for January through March (in order to avoid Penalty B, coverage also must be MV).
- This transition is available only once – so if drop below 50 and then grow again – no grace period.

## Offers By Multi-Employer Plans, Staffing Agencies

- Offer of coverage by employer includes offer of coverage made by a multiemployer or single employer Taft-Hartley plan or a MEWA to an employee on behalf of a contributing employer of that employee
- Offer of coverage made by a staffing agency to an employee performing services for an employer through the staffing agency where the employer's fee is higher than fee paid if employee did not enroll in health coverage will be treated as offer by the employer



# Transition Rules for Non-Calendar Year Plans

- Transition guidance applies for period before 1<sup>st</sup> day of 1<sup>st</sup> non-calendar plan year beginning in 2015 if you had a non-calendar plan year on 12/27/12 and have not modified to begin later
- Relief for employees eligible under rules on 2/9/14 for coverage in 2015 plan year—can avoid penalties by offer of affordable MV coverage no later than first day of 2015 plan year, so long as these employees are not an insufficient percentage of all employees who should be offered coverage (rules on what is insufficient percentage—next slide)
- No penalty if offer to 95% (70% in 2015) by first day of 2015 plan year affordable MV coverage

# Transition Rules for Non-Calendar Year Plans

- Significant Percentage Transition (All employees)
  - Must have, as of any date in 12 months prior to 2/9/14, covered at least 1/4 of all employees under the non-calendar year plan(s); or
  - Must have offered coverage to 1/3 or more of employees during open enrollment ending prior to 2/9/14
- Significant Percentage Transition (FT employees)
  - Must have, as of any date in 12 months prior to 2/9/14, covered at least 1/3 of all FT employees under the non-calendar year plan(s); or
  - Must have offered coverage to 1/2 or more of employees during open enrollment ending prior to 2/9/14

# Transition Rules for Non-Calendar Year Plans

- Reporting to IRS must cover all of 2015, but can determine employees that should be reported for periods prior to non-calendar plan year beginning using actual service or look-back data
- No penalties assessed for prior to non-calendar year beginning if meet transition requirements—but reporting is due for entire calendar year

# What Do You Need to Do Now?

- **Keep focusing on the big picture**
- If you haven't yet, review your program and determine if it meets rules and if any changes are helpful
- Determine risk, if any, for A or B Penalties during transition and 2016 and later
- Confirm your basic strategy (e.g., Pay? Play? Risk level? Risk reduction?)
- Determine if any action needed to respond to changes made in final rules (e.g., changes to staffing agency vendor contracts regarding fee for health coverage, record-keeping changes, delay structural changes)
- Continue working with your team on implementation
- Begin any tracking necessary for compliance as of 1/1/15 (or 1/1/16 for less than 100 employees)

## Questions?

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