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HR NEWS

IPMA-HR

Impacts of the Affordable Care Act

Public Sectors Organizations: Prepared to Comply With the ACA Employer Mandate

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What Obesity's Designation as a Disease Means for Health Plan Sponsors

Staying ACA Compliant in 2015

By John A. Haslinger

The Affordable Care Act (ACA) is a complicated piece of legislation that has generated thousands of pages of complex regulations. Based on my discussions with large employers, all Applicable Large Employers (ALEs), I believe the most significant regulations pertain to:

- Employer Shared Responsibility, which takes effect in 2015 and
- The "Cadillac" Excise Tax, which becomes effective in 2018.

ALEs are employers with at least 50 full-time employees and full-time equivalents employees. *Note: For 2015, employers with 50 (but no more than 99 employees) are exempt from most shared responsibility requirements applicable to ALEs other than the need to file Forms 1095-C and 1094-C in 2016.*

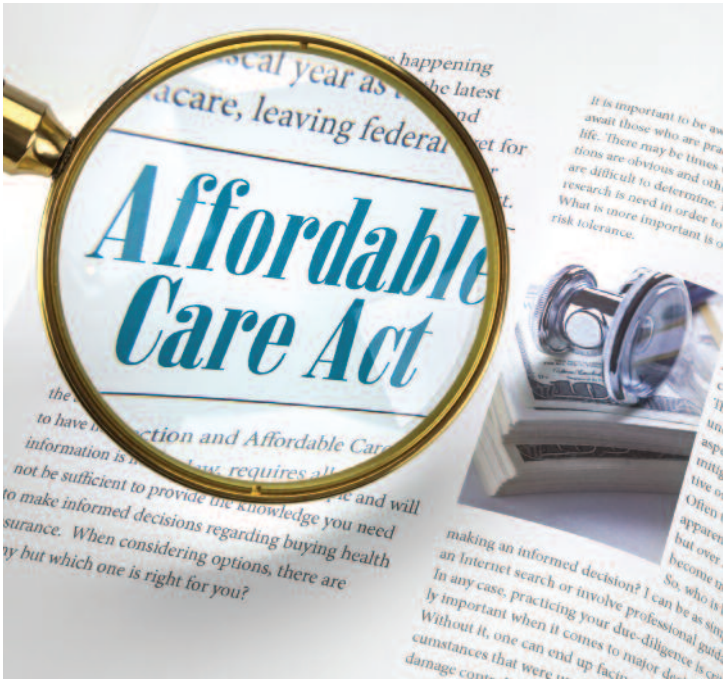
Shared Responsibility

The ACA imposes significant non-deductible tax penalties for employers who fail to comply with the Employer Shared Responsibility regulations under Internal Revenue Code Sec. 4980 related to offering qualified coverage to all employees who meet the definition of "full-time" under the ACA.

If an ALE wants to avoid paying penalties, there are four requirements under Sec. 4980 that the ALE must do:

- Accurately identify 100 percent of its ACA full-time employees (i.e., those who average at least 30 hours of service per week).
- Offer Minimum Essential Coverage (MEC) to substantially all of these employees and their dependent children.
- Ensure that the MEC has at least an actuarial value of 60 percent and includes coverage for in-patient hospitalization care.
- Ensure that the cost of individual coverage (i.e., coverage for the employee only – not including dependent children or spouse) that is charged to the employee is affordable using one of the following safe harbors, which will ensure that the cost is no more than 9.5 percent of the:
  - federal poverty level
  - employee's monthly rate of pay
  - employee's Box-1 W-2 wages

An ALE that meets the above four obligations will not be subject to penalties under Sec. 4980. These penalties can be significant for ALEs, who do not meet all of the above requirements.



For example, under Sec. 4980H(a) employers must be able to document that they have offered MEC to at least 70 percent of all ACA full-time employees – it is very important to note that this 70 percent threshold will increase to 95 percent beginning in 2016 and for all subsequent years.

If an employer fails to meet this offering requirement – or cannot document that they met it – they will likely be subject to a non-deductible tax penalty of $2,000 times every one of its ACA full-time employees. *Note: For 2015, ALEs may exclude the first 80 such employees when determining the penalty. Beginning in 2016 and thereafter, ALEs may only exclude the first 30 such employees.*

An employer with 2,500 ACA full-time employees, who fails to meet the offering requirement under Sec. 4980H(a) could be subject to a non-deductible annualized penalty in the amount of $4.8 million dollars in 2015 as shown below:

Total number of ACA full-time employees	**2,500**
Excludable employees in 2015	**80**
Total number of employees subject to penalty	**2,420**
Non-deductible annualized penalty	**$2,000**
Total non-deductible penalty	**$4,840,000**

An ALE could fail to offer MEC coverage to at least 70 percent (95 percent in 2016 and beyond) of its ACA full-time employees due to any number of simple mistakes, including but not limited to:

- **Failing to accurately count all hours of service.** The most common area of concern is failing to accurately count hours related to the three special unpaid leaves – Jury Duty, FMLA, USERRA
- **Misclassifying employees as 1099 Independent Contractors.** Employers should check annually that their independent contractors are properly classified and that they aren't actually employees. Several different tests may apply to determine independent contractor status including the IRS Twenty Factor right-to-control test. This process should be reviewed by legal staff.
- **Not properly accounting for temporary workers hired through a staffing agency.** If an ALE does not want to consider such workers as their employees they need to do the following two things:|
    - Confirm that the contract with the staffing agency clearly indicates that such employees are employees of the staffing agency and that the staffing agency is solely responsible for all employment related compliance, including ACA.
    - Ensure that the staffing agency bills the employer an incremental cost differential to reflect the cost of compliant health care that the staffing agency provides to its ACA full-time employees. *Note: It is a best practice for this cost differential to be broken out as a separate line item on the invoice from the staffing agency.*

For 2015, I believe the likelihood that an ALE will fail the 4980H(a) requirements is relatively low – as a result of the transition relief, which lowered the threshold from 95 to 70 percent for this one year. However, beginning in 2016 the threshold increases to 95 percent, and this becomes a real risk for many ALEs.

But even ALEs that meet the Sec. 4980H(a) requirements may still be subject to penalties for failing to meet the requirements under Sec. 4980H(b).

The penalties under Sec. 4980H(b) are triggered on an employee by employee basis – unlike the penalties under Sec. 4980H(a) where a single ACA full-time employee who has not been offered coverage and qualifies for a federal tax credit/subsidy can trigger the penalty on all ACA full-time employees.

Under Sec. 4980H(b), an ALE can be subject to an annualized non-deductible penalty in the amount of $3,000 for each ACA full-time employee for whom it fails to do any of the following:

- Make a valid offer of MEC to an ACA full-time employee.
- Ensure that the MEC that is offered covers hospitalization expenses and has an actuarial value of at least 60 percent.
    - Under the ACA, a health insurance plan's actuarial value indicates the average share of medical spending that is paid by the plan, as opposed to being paid out of pocket by the consumer (For a small number of plan designs it may be necessary to have an actuarial valuation done. The calculation takes into account a plan's various cost-sharing features, such as deductibles, coinsurance, copayments, and out-of-pocket limits. Employers can document the actuarial value of each plan by using the HHS Calculator at http://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/mv-calculator-final-4-11-2013.xlsm.
- Ensure that the MEC with at least a 60 percent actuarial value is affordable under one of the three safe harbors mentioned previously.

In aggregate the penalty under Sec. 4980H(b) cannot exceed the total penalty that could be incurred under Sec. 4980H(a), in spite of the fact that on an individual basis the penalty amount is actually larger—$3,000 compared to $2,000.

Of course, the penalty under either 4980H(a) or (b) can only be triggered if the ALE fails to meet one of the requirements summarized above AND the affected ACA full-time employee actually goes to an exchange AND qualifies for a federal tax-credit/subsidy.

The Excise Tax

My view is that the excise tax on high cost health plans that hit defined thresholds has two purposes:

- To help slow increases in the cost of health care over time.
- To slowly phase out most of the preferential tax treatment currently available to employer sponsored health care plans.

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Compliant

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Beginning in 2018, employers will be subject to a non-deductible excise tax on the cost of benefits that exceed a specified limit.

Self-insured employers will pay this tax directly. For full-insured plans, the tax will be paid by the insurance company – but virtually all observers anticipate that this will then be charged back to the employer that is sponsoring the plan.

The limits that go into effect beginning in 2018 will include both employer AND employee contributions for all of the following items:

- Insurance premiums for health and Rx. If the plan is self-insured the employer will take into account the following:
  - Paid claims
  - ASP fees
  - Pending But Not Reported Reserves / IBNR
- All pre-tax contributions made by the employer or the employee into a company sponsored:
  - FSA
  - HSA
  - HRA
- The Fair Market Value (FMV) of any on-site health clinics.

The limits beginning in 2018 are $10,200 for the cost of individual coverage and $27,500 for the cost of "family" coverage. Note: family coverage includes any tier of coverage other than "individual." These limits are indexed to inflation as measured by the CPI. However, employers should keep in mind that since 1965 there is not a single year in which per capita health spending did not increase faster than the CPI – that is 49 consecutive years, without a single exception.

This suggests that most, if not all, employers may eventually have plans that exceed the excise tax caps. The following examples illustrate just how costly exceeding the excise tax caps can be – even for plans that only exceed the caps by a relatively small amount on an annual basis.

EXAMPLE 1	INDIVIDUAL COVERAGE	FAMILY COVERAGE	
Excise Tax Limit	$10,200	$27,500	
Cost of Plans	$10,550	$28,225	
Amount Subject to Excise Tax	$350	$725	TOTAL
Number Enrolled	500	1,500	2,000
Annual Penalty in 2018	**$70,000**	**$435,000**	**$505,000**

EXAMPLE 2	INDIVIDUAL COVERAGE	FAMILY COVERAGE	
Excise Tax Limit	$10,200	$27,500	
Cost of Plans	$10,550	$28,225	
Amount Subject to Excise Tax	$350	$725	TOTAL
Number Enrolled	1800	6,200	8,000
Annual Penalty in 2018	**$252,000**	**$1,798,000**	**$2,050,000**

Employers should conduct an Excise Tax Liability Analysis to determine the likely date that one or more of their plans will exceed the caps. Once this has been identified, employers should begin evaluating strategies to address this issue.

One very effective strategy is to offer employees a choice of a high deductible consumer driven health plan. When communicated effectively and supported by robust decision support tools such plans can attract between 30 percent and 50 percent of employees. In particular, younger employees with very low health care expenses and higher paid employees seeking the tax benefits of an HSA both find such plans attractive.

As employees migrate into high deductible plans, the enrollment in traditional high-cost plans decreases. This migration reduces the potential liability under the Excise Tax – and also reduces the number of employees impacted in the event that such high cost plans need to be eliminated in the future.

Conclusion

The ACA is the most significant and complex piece of social legislation in at least a generation. It directly impacts almost 20 percent of the entire economy – affecting every person, as well as every employer, every health care provider, every insurance company selling health related products, every pharmaceutical company and every medical device manufacturer.

Changes to the law itself are possible over the next decade and beyond. And certainly, regulations – both new and revised – will continue to be issued for decades to come. It is imperative that employers stay abreast of the current and emerging requirements for two reasons:

- Avoid non-deductible tax penalties.
- Continue to effectively utilize health care benefits as a strategic element of the employment relationship.

The ACA will influence how employers design and make health care benefits available to their employees.

All employers need to understand the implications, especially the financial risks involved. After all, failure to comply with the ACA could result in heavy penalties – possibly stiffer than many employers understood – reaching into the millions of dollars. Employers need to continue planning strategic responses to the current and future regulations associated with the ACA, if they are to avoid penalties and continue to offer health care benefits that are an important part of the total compensation package used to attract, retain, motivate and engage employees.

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