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Complying with the Affordable Care Act—A Program for Employers

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Organization and Overview

- Background:
  - The Supreme Court's decision in *NFIB v. Sebelius*
  - Possible future challenge re: premium subsidies
- Employer Shared Responsibility (pay-or-play)
- Other upcoming employer requirements
  - Summaries of benefits and coverage
  - Form W-2 reporting
  - MLR rebates
  - $2500 medical FSA limit
  - PCORI fees
- Upcoming guidance

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Challenges to the Act

- *NFIB v. Sebelius*
  - Held: dispute is timely
  - Upheld the Act's individual mandate based on the Constitution's "taxing power" (not under the Commerce Clause)
  - Limited the Act's Medicaid expansion
- Looming challenge based on whether low-income premium subsidies are permitted in states that fail to establish an exchange

Employer Shared Responsibility

- Applicable Large Employer—"an employer that employed at least 50 full-time employees, including full-time equivalent employees, on business days during the preceding calendar year"
- Beginning in 2014, each applicable large employer is subject to an assessable payment if any full-time employee is certified as eligible to receive an applicable premium tax credit or cost-sharing reduction and either:
  - No-coverage prong: Employer fails to the opportunity to enroll in "minimum essential coverage" under an "eligible employer-sponsored plan" or

Employer Shared Responsibility (cont'd)

- Coverage prong: The employer offers its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan that, with respect to a full-time employee who qualifies for a premium tax credit or cost-sharing reduction, either is
  - "Unaffordable" or
  - Does not provide "minimum value"
- No coverage prong penalty: an assessable payment equal to $166.67 multiplied by the number of the employer's full-time employees, excluding the first 30
- Full-time means "regularly scheduled" 130 hours per month

Employer Share Responsibility (cont'd)

- Coverage prong penalty: Lesser of:
  - $250 per month multiplied by the number of full-time employees who qualify for and receive a premium tax credit or cost-sharing reduction from a health insurance exchange; or
  - The amount that would be charged under the no-coverage prong
- "Minimum essential coverage" includes coverage under an "eligible employer-sponsored plan" but not excepted benefits
- Employer-provided health insurance coverage is "unaffordable" if the premium required to be paid by the employee exceeds 9.5% of the employee's W-2 income

Full-Time Employees—Ongoing

- Notice 2012-58: Employed for at least one full "standard measurement period"
- Standard measurement period: not less than three but not more than 12 consecutive calendar months, as chosen by the employer for all employees in the "same category"
- Categories include:
  - Collectively bargained employees and non-collectively bargained employees;
  - Salaried employees and hourly employees;
  - Employees of different entities; and
  - Employees located in different States

Full-Time Employees—Ongoing (cont'd)

- Must cover for corresponding "stability period," i.e., longer of
  - Six months or
  - The length of the standard measurement period
- Administrative period of up to 90 days allowed, so there can gap between the end of the measurement period and the start of the stability period
- Example: 12-month stability period begins January 1 and a 12-month standard measurement period that begins October 15. October 14 to January 1 is the administrative period. Previously-determined full-time employees must continue to be offered coverage

New Hires (Definitions)

- "Variable hour employee"—based on the facts and circumstances at the start date, it cannot be determined that the employee is reasonably expected to work on average at least 30 hours per week
- "Seasonal employee"—reasonable, good faith interpretation of the term
- "Initial measurement period"—a period between three and 12 months, as selected by the employer
- "Administrative period"—counts as part of the measurement period; with initial measurement period can't exceed 13 months plus partial month

Example 1

- An employer chooses a 12-month stability period that begins January 1 and a 12-month standard measurement period that begins October 15. The period between the end of the standard measurement period (October 14) and the beginning of the stability period (January 1) is the administrative period. Previously-determined full-time employees already enrolled in coverage must continue to be offered coverage during the administrative period.

Full-Time Employees—New Hires

- Employer
  - Measures the hours of service completed by the new employee during the initial measurement period; and
  - Determines whether the employee completed an average of 30 hours of service per week or more during this period
- Stability period must not —
  - Be more than one month longer than the initial measurement period, nor
  - Exceed the remainder of the standard measurement period, plus any associated administrative period for new hires in which the initial measurement period ends

Changes in Status—Full-Time/Part-Time

- If a new hire's status in the initial measurement period is not the same as his or her status in the first standard measurement period
- Change from full-time to part-time status must await the end of the stability period
- Change from part-time to full-time must be implemented in the first standard stability after the first standard measurement period

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Additional New-Hire Limit

- The initial measurement period cannot exceed 12 months
- The administrative period associated with the initial measurement period cannot total more than 90 days; and
- The combined initial measurement period and administrative period cannot last beyond the final day of the first calendar month beginning on or after the one-year anniversary of Employee Y's start date

Example 2

- 12-month initial measurement period that begins on the start date and applies an administrative period from the end of the initial measurement period through the end of the first calendar month beginning on or after the end of the initial measurement period.
- Employee Y is hired on May 10, 2014. Employee Y's initial measurement period runs from May 10, 2014, through May 9, 2015. Employee Y works an average of 30 hours per week during this initial measurement period.
- The employer offers coverage to Employee Y for a stability period that runs from July 1, 2015 through June 30, 2016.
- Employee Y works an average of 30 hours per week during his initial measurement period and the employer uses (1) an initial measurement period that does not exceed 12 months; (2) an administrative period totaling not more than 90 days; and (3) a combined initial measurement period and administrative period that does not last beyond the final day of the first calendar month beginning on or after the one-year anniversary of Employee Y's start date.

Waiting Periods—Notice 2012-59

- For plan years beginning on or after January 1, 2014, all group health plans (irrespective of size) and group health insurance issuer must not apply any waiting period that exceeds 90 days
- Waiting period means “the period that must pass before coverage for an employee or dependent who is otherwise eligible to enroll under the terms of a group health plan can become effective”
- Assessable payments not be imposed during a 90-day waiting period that complies with the requirements of the Act
- Notice 2012-59 coordinates the waiting period rules with the employer shared responsibility rules

Staffing/Client Challenges

- IRS generally considers temporary employees to be common law employees of the staffing firm, and not the end-user client
- Compliance costs will likely increase (similar to any other additional tax or benefits mandate)
- Employer shared responsibility rules are designed to two-party arrangements, not three-party
- PrideStaff is working toward a competitive plan design that will ensure compliance with the new rules while at the same time delivering value to our clients

Staffing/Client Challenges—Notice 2012-58

- The "ongoing/new-hire" distinction proposed by Notice 2012-58 is often meaningless in the temporary staffing setting
  - Additional work needed
  - E.g., a worker who has not completed a full measurement period is a new-hire, even if previously "on-boarded"
  - Or, staffing firm internal policies should determine breaks in service
- Beware of "avoidance" strategies: work only with reputable firms (regulators are watching)

Impact on the Staffing Relationship

- End-user clients will rely on (and likely require written representations regarding) compliance by staffing firms
- In certain instances (e.g., companies that rely of per diem employees), companies will become more reliant on staffing firms so as to manage their own exposure for assessable payments
- The aggregate cost of compliance will vary form staffing firm-to-staffing firm—hence a premium of efficient plan design and compliance approach

Hidden Employer Tax under Medicaid

- Additional taxes under Code § 4980B
  - Exchange eligible full-time employees with HI between 138% and 400% of FPL
  - But in states that declined the Medicaid expansion, full-time employees with HI from 100% to 138% of HI will be exchange eligible
- Greater chance of triggering Code § 4980B(a) (no-coverage prong) penalty; and potentially higher exposure under Code § 4980B(b)

The Next Challenge: Premium Support

- PPACA opponents claim that Code § 36B premium tax credits are available only in states that affirmative establish an exchange
- Code § 36B does applies a broader rule
- If opponents are challenge and prevail, then in states the opt for a Federally-facilitated exchange have no Code § 4980B exposure, since no FT employee has access to the subsidy

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Summaries of Benefits and Coverage

- Effective for open enrollments (or for plans without open enrollment, plans years) commencing after September 23, 2012
- SBC requirements apply to
  - Group health plans (whether insured or self-insured)
  - Health insurance issuer offering group health coverage
- Plan offering only "excepted benefits" excluded (e.g., stand-alone dental or vision plan)
- Medical FSAs
  - If integrated, included with GHP
  - If not integrated, separate SBC required

SBCs—Distribution

- To employer: (i) within 7 business days after receipt of an application for health coverage, (ii) by the first day of coverage (if there any changes) and in connection with written application. Or within 30 days if renewal is automatic
- To participants: As part of the written application or enrollment materials. If the plan does not distribute written enrollment materials, no later than the first date eligibility for coverage by the first day of coverage, if there are any changes

SBC—Delivery

- Both the health insurance issuer and the plan administrator of a group health plan must furnish
- This obligation is discharges as to any one party if the other furnishes the SBC
- Non-distributing party should
  - Review the form and content of the SBC to ensure accuracy
  - Periodically monitor whether SBCs requirements are being complied with
- Special problems with electronic delivery

Form W-2 Reporting

- Employers must report the aggregate cost of applicable employer-sponsored group health plan coverage on Form W-2 for taxable years beginning on or after January 1, 2011
- Notice 2012-09 (replacing Notice 2011-28) provides guidance
- Rule applies to 2012 reporting, which will take place in January 2013
- Employers can voluntarily choosing to comply in 2011

Form W-2 Reporting (cont'd)

- Notice 2011-28 which further delayed the mandate for employers issuing fewer than 250 W-2s
- Nor do employers have to report the health care costs of employees on their W-2s if they left mid-way through the calendar year until the IRS offers more guidance

Notice 2012-09 Clarifications

- Coverage under Employee Assistance Program (EAP) or Similar Program
- Third Party Sick Pay Provider
- Reporting Programs That Include Non - Covered Benefits
- Impact of Employee Status Changes After Year - End
- Coverage Periods Spanning Two Taxable Years
- Hospital Indemnity/ Specified Disease or Illness Insurance

Minimum Loss Ratio Rebates

- By August 1, 2012 carriers must have procedures in place and process 2011 plan year rebates
- Rebates are generally subject to ERISA plan assets rules
- DOL Tech. Rel. 2011-04
  - If employer pays all, rebate is not a plan asset; employer retains
  - If employee pays all, rebate is a plan asset; must be returned to employees
  - Special rules apply in the case of fixed employer or employee contributions
- May be cash payment, premium holiday or benefit enhancement

Minimum Loss Ratio Rebates (cont'd)

- Rebate must be applied to the plan that generated the rebate, but may be limited to current employees
- Rebate must be fully deployed with three months in order to avoid ERISA trust requirement
- Tax treatment
  - If employee contributions are pre-tax, i.e., made under a cafeteria plan, then employee portion is taxable to the employee in year of receipt (most common scenario)
  - Premium holidays automatically result in an increase in taxable compensation
- Similar rules apply to non-ERISA plans

Exchange Notices

- Effective date is March 1, 2013
- Employers must provide to employees notice of
  - Availability of coverage under a state-based or Federally facilitated health insurance exchange
  - Related items (e.g., tax credits or cost-sharing reductions)
- Effective date is March 1, 2013
- Model notice is not yet available

$2500 Medical FSA Limit

- Beginning January 1, 2013, total contributions to FSAs will be limited to $2,500 per year, subject to adjustment for annual cost of living increases
  - Limit applies to health FSAs; dependent care FSAs
  - Health Reimbursement Arrangements (HRAs) and Health Savings Accounts (HSAs) are excluded
- The $2,500 limit on health FSA salary reduction contributions applies on to “taxable years”—not clear whose

Notice 2012-40

- $2,500 limit applies on a plan-year basis; and plans may adopt the required amendments at any time through the end of calendar-year 2014
- Grace periods—unused salary reduction contributions to the health FSA for plan years beginning in 2012 or later that are carried over into the grace period for that plan year will not count against the $2,500 limit for the subsequent plan year
- Relief for certain salary reduction contributions exceeding the $2,500 limit due to reasonable mistake and not willful neglect, and that are corrected by the employer

Additional Medicare Tax

- Social Security and Medicare by FICA
  - 15.3% tax on “wages” paid by the employer and by employees
  - Hospital insurance or “HI” portion was 1.45% each
- Act increases the employee portion of the HI tax by 0.9% on workers with incomes of over $200,000 for single filers and $250,000 for joint filers
- Effective for taxable years commencing after December 31, 2012

June 11, 2012 IRS Q&As

- Threshold Amounts
  - Married filing jointly $250,000
  - Married filing separately $125,000
  - Single $200,000
  - Head of household (with qualifying person) $200,000
  - Qualifying widow(er) with dependent child $200,000
- Employer's obligation to withhold

June 11, 2012 IRS Q&As (cont'd)

- Employers must withhold the Additional Medicare Tax on wages or compensation paid to an employee in excess of $200,000 in a calendar year
  - Without regard to marital status as claimed on an employee's Form W-4
  - Irrespective of whether an employee is liable for the tax; and
  - To employees who are non-resident aliens and US citizens living abroad
- Special rules for common paymasters
- Withholding required on non-cash wages

PCORI Fees

- Effective July 31, 2013
- Patient-Centered Outcomes Research Institute (PCORI) fee
- Imposed on plan sponsors and issuers of individual and group policies
- Fees fund comparative effectiveness research
- Fee must be filed by July 31 of the calendar year immediately following the last day of the plan year

Employer Issues—2014 and Beyond

- Automatic enrollment required for employers with more than 200 full-time employees
- Restricted annual limits on essential health benefits do not apply beginning in 2014
- Cafeteria plans of employers with 100 or fewer employees may offer coverage of full-time employees through an Exchange
- Preexisting condition exclusions for adult enrollees and other discrimination based on health status must not be permitted
- Wellness program restrictions not permitted
- Waiting periods over 90 days not permitted
- 2018 – High cost health plan or “Cadillac plan” tax

Selected Upcoming Guidance

- Code § 4980 Employer-Shared responsibility
  - Minimum value determinations
  - Assessable payment calculations
- Insurance non-discrimination (delayed by Notice 2011-1)
- Waiting periods
- Essential health benefit definition
- Automatic enrollment
- Wellness program design

Questions & Answers

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