A Primer to the Affordable Care Act's Employer Mandate

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By Terri L. Ackerman, Esquire
Moffatt Thomas Barrett Rock & Fields, Chtd, Idaho Falls
with commentary by Financial Advisor and Licensed Insurance Broker Russell Paskett,
Keystone Financial Strategies,
and Theresa Niland,
Senior Associate General Counsel and Privacy Officer for Blue Cross of Idaho

A. Introduction

The aim of the Patient Protection and Affordable Care Act ("ACA" or "ObamaCare") is to increase the number of individuals who have health insurance. In order to achieve this aim, the ACA imposes an "Employer Mandate" or "Employer Responsibility Provisions" on employers with the equivalent of 50 or more full time employees to provide "Affordable" "Minimum Essential Health Insurance Coverage" that provides a "Minimum Value" of health insurance benefits to a certain percentage of their full time employees. *See* 26 U.S. Code §4980H; http://www.law.cornell.edu/uscode/text/26/4980H; *See also* https://www.federalregister.gov/articles/2014/02/12/2014-03082/shared-responsibility-for-employers-regarding-health-coverage. Small businesses with less than the equivalent of 50 full-time employees are exempt.

Those employers who are required to offer such coverage, but fail to do so within the required timeframe, must make a "Shared Responsibility Payment." *Id.* According to the Treasury Department, the purpose of the Shared Responsibility Payment is "to help offset the costs to taxpayers of their employees getting tax credits through the Health Insurance Marketplace." *See* http://www.treasury.gov/press-center/press-releases/Pages/jl2290.aspx. Basically, the Employer Mandate "was written into the law as a guardrail to discourage employers from shifting workers into tax-subsidized coverage." *See* Ricardo Alonso-Zaldivar, *Associated Press: Health Care Tweek: Big Companies Get Wiggle Room*, February 12, 2014. http://hosted.ap.org/dynamic/stories/U/US_HEALTH_OVERHAUL_EMPLOYER_REQUIREMENT?SITE=AP&SECTION=HOME&TEMPLATE=DEFAULT&CTIME=2014-02-11-17-58-06.

1. Which employers must comply?

To determine whether an employer is subject to the Employer Mandate, "the government doesn't actually count full-time workers. It uses a complicated formula that averages part-timers' hours and converts them to the equivalent of full-time workers." *Id.* As I explain in detail below, the computations necessary to count employees for the purposes of the ACA Employer Responsibility Provisions are not as simple as one might expect. Many businesses may be surprised to find that they are considered to have an excess of 50 full time employees after part-

time employees are added together, and/or after employees from various different businesses with common ownership are aggregated and treated as a single employer per the ERISA-controlled group rules to which the ACA and the IRS refer for this purpose.

In this paper, I present basic information regarding the Employer Responsibility Provisions under the ACA. Financial Advisor and Licensed Insurance Broker Russell Paskett, of Keystone Financial Strategies, and Theresa Niland, Associate General Counsel and Privacy Officer of Blue Cross of Idaho have contributed commentary.

B. The Obama administration has delayed and phased in enforcement of some provisions

(1) Delays and "phased in" enforcement

On February 10, 2014, the U.S. Department of the Treasury and the Internal Revenue Service issued final regulations implementing the employer responsibility provisions under the ACA that take effect in 2015. *See* http://www.treasury.gov/press-center/press-releases/Pages/jl2290.aspx. As stated by the Treasury Department, these regulations "phase in the standards to ensure that larger employers either offer quality, affordable coverage or make an employer responsibility payment starting in 2015 to help offset the cost to taxpayers of coverage or subsidies to their employees." *Id.* "[C]ompanies with 50- 99 employees that do not yet provide quality, affordable health insurance to their full-time workers will report on their workers and coverage in 2015, but have until 2016 before any employer responsibility payments will apply." *Id.* Besides giving businesses with between 50 and 99 workers an additional year to comply, the Administration has changed the rules so that larger employers with 100 or more employees must offer Minimum Essential Health insurance Coverage to 70% of their full time workers—rather than 95%, as had previously been required—by 2015. *Id.* Such larger businesses will have to offer health insurance to 95% of their workers in 2016 and beyond. *Id.*

Previously, the Obama Administration had delayed the Employer Mandate from January 2014 to January 2015.

(2) Limited transition rules

The U.S. Department of the Treasury has announced that "a package of limited transitional rules that applied to 2014 under the proposed regulations is extended to 2015 under the final regulations." *See U.S. Treasury Department Fact Sheet, Final Regulations Implementing Employer Shared Responsibility Under the Affordable Care Act (ACA) for 2015*, a link to which can be found here: http://www.treasury.gov/press-center/press-releases/Pages/jl2290.aspx.

This package of limited transitional rules includes the following:

> -Employers first subject to shared responsibility provision: Employers can determine whether they had at least 100 full-time or full-time equivalent employees in the previous year by reference to a period of at least six consecutive months, instead of a full year. This will help facilitate compliance for employers that are subject to the employer shared responsibility provision for the first time.

-Non-calendar year plans: Employers with plan years that do not start on January 1 will be able to begin compliance with employer responsibility at the start of their plan years in 2015 rather than on January 1, 2015, and the conditions for this relief are expanded to include more plan sponsors.

-Dependent coverage: The policy that employers offer coverage to their full-time employees' dependents will not apply in 2015 to employers that are taking steps to arrange for such coverage to begin in 2016.

-On a one-time basis, in 2014 preparing for 2015, plans may use a measurement period of six months even with respect to a stability period—the time during which an employee with variable hours must be offered coverage—up to 12 months.

Id. The Treasury Department has indicated that as these limited transition rules take effect, it will consider whether it is necessary to extend any of them beyond 1025. *Id.*

(3) Next steps: Final rules simplifying employer information reporting

The U.S. Department of the Treasury has also announced that in response to comments on the proposed employer reporting regulations, the "Treasury and the IRS will issue final regulations shortly that aim to substantially simplify and streamline the employer reporting requirements." *See U.S. Treasury Department Fact Sheet, Final Regulations Implementing Employer Shared Responsibility Under the Affordable Care Act (ACA) for 2015*, a link to which can be found here: *http://www.treasury.gov/press-center/press-releases/Pages/jl2290.aspx*.

C. Small businesses and the ACA

(1) Small businesses are not required to offer health insurance

"Small businesses" with fewer than the equivalent of 50 employees are not required to provide coverage or fill out any forms in 2015, or in any year, under the ACA. http://www.treasury.gov/press-center/press-releases/Pages/jl2290.aspx.

Employees of small businesses are, however, required to carry Minimum Essential Health Insurance Coverage, per the ACA "Individual Mandate."

(2) The ACA encourages small businesses to offer Minimum Essential Health Insurance Coverage with tax incentives

The ACA encourages qualified businesses with fewer than 25 employees to provide Minimum Essential Health Insurance Coverage. In this regard, for businesses with 1 to 10 employees, business credit is available to subsidize 35% (increasing to 50% in 2014) of the cost of the health insurance premium paid by the employer if the employee wages average less than $25,000. The employer must pay 50% or more of the insurance to qualify for credit. With regard to businesses

with 11 to 24 employees, a phased-out business credit is available to subsidize a portion of the cost of the health insurance premium paid by the employer, if the employee wages average less than $50,000. The employer must pay 50% or more of the insurance to qualify for the credit.

(3) Small businesses will be able to purchase coverage for their employees on the Small Business Options Program ("SHOP") exchange

Small businesses seeking coverage for their employees will be able to use the "Small Business Health Options Program" ("SHOP") exchange. The SHOP exchange is designed to assist qualified small employers and their employees with the purchase of Qualified Health Plans offered in the small group market. Qualified small employers are able to select one or more of the Qualified Health Plans available in the SHOP to offer to their employees. They can also set the amount they will contribute to Qualified Health Plan premiums. Note that small businesses seeking coverage on the SHOP exchange will not be eligible for any tax credits or any cost sharing reductions at the employee level. These are only available to individuals purchasing insurance through the Individual Insurance Exchange. In 2017, states can decide whether to let large businesses into their exchanges.

(4) Small businesses may find that they are better served by allowing their employees to purchase their own health insurance, and offer some other type of remuneration in lieu of the same

As discussed above, the ACA makes it possible for individuals to purchase health insurance coverage for themselves and their families at a policy premium that is not be affected by the fact that they are not purchasing insurance as part of an employer group. Individuals can also take the health insurance coverage they purchase from Insurance Exchanges with them to a new job at another small business that also does not provide health insurance coverage, if they so wish. This frees up small businesses to consider whether it makes sense for them to continue to offer health insurance coverage to their employees. Rather than continuing to offer health insurance coverage, they could, for example, offer their employees a 401k plan, a pay raise, and/or a bonus.

A good certified public accountant and licensed insurance broker can help a small business and its employees decide whether it would be best for all concerned to (1) continue an existing medical benefits program, (2) institute a new one, or (3) have the employees purchase individual or family health insurance coverage on the Insurance Exchange or directly from a health insurance carrier, and provide some other remuneration in lieu of a health benefits package. Some small businesses may find that all or most of their employees would rather purchase their own health insurance, and receive some other type of remuneration in lieu of the same.

D. How are full-time equivalent employees calculated?

(1) What is a full-time employee, per the ACA?

Under the ACA, "full-time employees" are those who provide an average of at least 30 hours of service per week or 130 hours per month. Hours of service include not only hours worked, but also all hours for which employees are paid or entitled to payment even when no work is

performed due to vacation, holiday, illness, incapacity (including disability), layoff, jury duty, military duty or leave of absence. *See* 26 U.S. Code §4980H; http://www.law.cornell.edu/uscode/text/26/4980H.

Additionally, the term "full-time employee" also includes "full-time equivalent employees" ("FTEs"). FTEs are calculated by dividing the total number of hours of services of all other employees (who work less than 30 hours per week), including seasonal workers, by 120 for each month. *Id.*

As such, the calculation to determine the number of full-time employees is as follows:

1. The number of full-time employees, including seasonal workers, working an average of 30 hours of service per week for each month.

2. The number of FTEs.

3. Add 1 and 2 to determine total full-time employees (including FTEs) for each month.

4. After performing the calculation for each month, add all the numbers determined in step 3 for the entire year, and divide by 12, dropping any fraction to the lower whole number. If this number is 50 or more, the employer is an applicable "Large Employer," and will be responsible for complying with the employer shared responsibility mandate.

Id. Note that an exception exists, however, if the employer's workforce exceeds 50 full-time employees for 120 days or less during the preceding calendar year, and the employees in excess of 50 who were employed during that period of no more than 120 days were seasonal workers. The regulations state that for purposes of this particular exception, four calendar months may be treated as the equivalent of 120 days, and that the four calendar months and 120 days are not required to be consecutive. *Id.*

(2) The ACA relies upon ERISA provisions to prevent employers from dividing businesses into several smaller businesses in order to avoid the Shared Responsibility Provisions

In order to prevent employers from dividing businesses into several smaller businesses to avoid the "50 full-time employees" rule, the ACA also contains rules that require businesses with common ownership to be treated as a single employer.

These rules refer to two Code sections: 26 U.S. Code § 1563 (http://www.law.cornell.edu/uscode/text/26/1563), which deals with groups of corporations that qualify to file consolidated tax returns, and 26 U.S. Code § 414 (http://www.law.cornell.edu/uscode/text/26/414), which deals with commonly controlled businesses under ERISA. Because of the complicated nature of these rules, many commentators have noted that the analysis and answers to many questions regarding who is subject to the

employer mandate per the ACA are not the province of health-care attorneys, but rather tax attorneys. ERISA is an area of law that is complex, dense, and gives wide discretion to the IRS.

These ERISA controlled group rules will effectively cause many family-owned businesses to be aggregated for purposes of the ACA Shared Responsibility Provisions. Business owners who have a total of 50 full-time equivalent employees at completely different companies would have to provide coverage at both companies, even if each separate company falls below the 50 full-time equivalent employee threshold. Married couples and other family members may be surprised to find their staff combined by the IRS, which will enforce the Mandate. (Married couples may find themselves impacted by this provision, since tax law generally assumes that an individual also owns interest in their spouse's business.)

As stated by Christopher Condeluci, a D.C.-based attorney who helped draft the rule for the Senate Finance Committee, "[y]ou cannot get around the employer mandate." *See* Nancy Stanley, *CNNMoney: Circumventing Obamacare's Employer Mandate May Be Hard*, July 15, 2012, Newsmax, http://www.newsmax.com/Economy/obamacare-Employer-Mandate-health/2012/07/15/id/445416. "Its difficult to navigate the tax rules, and one mis-step could pull them into the employer mandate." *Id.*

Business owners with any concerns in this regard are well advised to consult with an attorney who is an ERISA specialist.

(3) The final regulations provide clarification regarding the status of employees of certain types and in certain occupations

As stated above, on February 10, 2014, the U.S. Department of the Treasury and the Internal Revenue Service issued final regulations implementing the Employer Responsibility Provisions under the ACA that take effect in 2015. *See http://www.treasury.gov/press-center/press-releases/Pages/jl2290.aspx*.

These final regulations provide clarification regarding whether employees of certain types or in certain occupations are considered "full-time," including:

> -Volunteers: Hours contributed by bona fide volunteers for a government or tax-exempt entity, such as volunteer firefighters and emergency responders, will not cause them to be considered full-time employees.
>
> -Educational employees: Teachers and other educational employees will not be treated as part-time for the year simply because their school is closed or operating on a limited schedule during the summer.
>
> -Seasonal employees: Those in positions for which the customary annual employment is six months or less generally will not be considered full-time employees.

-Student work-study programs: Service performed by students under federal or state-sponsored work-study programs will not be counted in determining whether they are full-time employees.

-Adjunct faculty: Based on the comments we received, the final regulations provide as a general rule that, until further guidance is issued, employers of adjunct faculty are to use a method of creating hours of service for those employees that is reasonable in the circumstances and consistent with the employer responsibility provisions. However, to accommodate the need for predictability and ease of administration and consistent with the request for a "bright line" approach suggested in a number of the comments, the final regulations expressly allow crediting an adjunct faculty member with 2 and 1/4 hours of service per week for each hour of teaching or classroom time as a reasonable method for this purpose.

See U.S. Treasury Department Fact Sheet, Final Regulations Implementing Employer Shared Responsibility Under the Affordable Care Act (ACA) for 2015, a link to which can be found here: *http://www.treasury.gov/press-center/press-releases/Pages/jl2290.aspx*.

(4) Two measurement methods are provided to determine whether an employee is a full-time employee

The final ACA regulations issued on February 10, 2014, provide two measurement methods by which an employer may determine whether an employee is a full-time employee: the monthly measurement method, and the look-back measurement method. Per the monthly measurement method, an employer counts the number of hours of service provided by a particular employee each month, in order to determine whether that employee is a full-time employee. Per the look-back measurement method, an employer determines an employee's full-time status during a future period known the "stability period," based upon the employee's hours of service in a prior period, referred to as the "measurement period." A link to the details of both of these methods of measurements in the final regulations can be found here: https://www.federalregister.gov/articles/2014/02/12/2014-03082/shared-responsibility-for-employers-regarding-health-coverage.

E. ACA definition of "Affordable Minimum Essential Health Insurance Coverage" that provides a "minimum value" of health insurance coverage

(1) What does "Minimum Essential Health Insurance Coverage include?

Per the ACA, the term "Minimum Essential Health Insurance Coverage" includes all of the following:

- **Government sponsored health programs**—such as Medicare (including Medicare Advantage), Medicaid, Children's Health Insurance Program (CHIP), medical coverage under chapter 55 of title 10, U.S.C., including coverage under the TRICARE program, coverage for members of the U.S. military, certain types of Veterans' health care (including CHAMPVA and certain children of Vietnam and Korean Vets), RICARE, health care for Peace Corps volunteers, and DOD nonappropriated Fund Health Benefits. *Id.*, §1.5000A (f)(1)(A);

- **Eligible employer-sponsored plans**—such as group health plans (whether an insured or self-insured group health plan) or group health insurance coverage offered through the small or large group market within a state, governmental plans, church plans, and grandfathered plans. Coverage provided by an employer to a former employee, including coverage under COBRA and retiree health coverage, qualifies as coverage under an eligible employer-sponsored plan. *Id.*, §1.5000A (f)(1)(B) and §1.5000A (f)(2);

- **Plans in the individual (non-group) market, and plans offered by an Exchange**. *Id.*, §1.5000A (f)(1)(C)

- **Grandfathered group health plans**—(coverage in effect on March 23, 2010) *Id.*, §1.5000A (f)(1)(D) ; and

- **Other coverage—**Such other health benefits coverage, such as a State health benefits risk pool, as the Secretary of Health and Human Services, in coordination with the Secretary of the treasury, recognizes for purposes of this subsection. *Id.*, §1.5000A (f)(1)(E).

The Department of Health and Human Services ("HHS") has authority to designate additional types of coverage as Minimum Essential Health Insurance Coverage. In this regard, on June 26, 2013, HHS designated Refugee Medical Assistance supported by the Administration for Children and Families and Medicare Advantage plans as Minimum Essential Health Insurance Coverage. HHS also designated state high risk pools and self-funded health coverage offered to students by universities for plan or policy years that begin on or before December 31, 2014, as Minimum Essential Health Insurance Coverage. For plan or policy years that begin after December 31, 2014, sponsors of state high risk pools and individual self-funded student health plans may apply to HHS to be recognized as Minimum Essential Health Insurance Coverage through the process outlined in 45 C.F.R. Section 156.604.
See http://www.gpo.gov/fdsys/pkg/FR-2013-02-01/html/2013-02139.htm

(2) Mandatory benefit categories in Minimum Essential Health Insurance Coverage

The following ten benefit categories must be included in Minimum Essential Health Insurance Coverage:

- Ambulatory patient services;
- Emergency services;
- Hospitalization;
- Maternity and newborn care;
- Mental health and substance use disorder services;
- Prescription drugs;
- Rehabilitative and habilitative services and devices;
- Laboratory services;
- Preventative and wellness services (including chronic disease management) (All plans must include annual doctor visits and medical screenings like mammograms and colonoscopies) with no out of pocket costs to members); and
- Pediatric services (including oral and vision care).

Anyone who is under the age of 19 will be required to have dental insurance. If an Insurance Exchange offers stand-alone dental plans, the other health plans offered on the Insurance Exchange need not provide for the pediatric dental care otherwise required as an Essential Health Benefit.

(3) Limited benefits plans fail to meet "Minimum Essential Health Insurance Coverage"

Minimum Essential Health Insurance Coverage does not include coverage providing only limited benefits, such as coverage only for vision care or dental care, workers' compensation, disability, automobile liability insurance, coverage only for a specific disease or condition, or coverage for employer-provided on-site clinics.

(4) Some employers must offer a plan that provides "Adequate" or "Minimum Value" coverage

A plan fails to provide "Minimum Value" if the plan's share of the total allowable costs of benefits provided under the plan is less than 60% of those costs. Stated differently, a plan is considered to provide adequate coverage, or Minimum Value, if the plan's actuarial value (ie: the share of the total allowable costs that the plan is expected to cover) is at least 60%. If the coverage offered by an employer fails to provide Minimum Value, an employee may be eligible to receive a Premium Assistance Tax Credit in connection with the purchase of insurance coverage through an Insurance Exchange, potentially exposing his or her employer to tax penalties.

(5) Those employers must offer a plan that is "Affordable"

If an employee's share of employer-provided coverage would cost the employee more than 9.5% of that employee's annual household income, the employee may be eligible for Premium Assistance Tax Credits in connection with insurance coverage purchased on an Insurance Exchange. "Household income" means the modified adjusted gross income of the employee and any members of the employee's family (which would include any spouse and dependents) who are required to file a Federal Income Tax return.

If an employer offers multiple healthcare coverage options, the affordability test applies to the lowest-cost option available to the employee that also meets the ACA "Minimum Value" requirement.

"[T]he final rules provide safe harbors that make it easy for employers to determine whether the coverage they offer is affordable to employees." *See U.S. Treasury Department Fact Sheet, Final Regulations Implementing Employer Shared Responsibility Under the Affordable Care Act (ACA) for 2015*, a link to which can be found here: *http://www.treasury.gov/press-center/press-releases/Pages/jl2290.aspx*. "These safe harbors permit employers to use the wages they pay, their employees' hourly rates, or the federal poverty level in determining whether employer coverage is affordable under the ACA." *Id.*

(6) Commentary:

By Russell Paskett, Keystone Financial Strategies
and Theresa Niland, Blue Cross Of Idaho

As we have heard in the news, millions of Americans on the individual insurance market received notices that their plans did not meet the ACA requirements of "Minimum Essential Health Insurance Coverage," and would be canceled. Group insurance policies will not receive these notices this year, because the Large Employer Mandate has been postponed.

In any event, no individual in Idaho got such a notice, because Idaho took a different approach. In Idaho, the Insurance Department decided that no plans were to be cancelled, but plans that lacked the above-mentioned "Minimum Essential Health Insurance Coverage" would not be renewed in 2014, and people would be moved ACA compliant plans when they renewed in 2014. Plans and carriers in Idaho took the next stop of contacting individuals and informing them that their plan was not going to be renewed, and if they did not choose a plan to replace the plan that was not going to be renewed, they would be automatically moved to a plan that would be comparable to the one that they had, so that there would be no gap in coverage.

On Thursday November 14, 2013, the President indicated that he will allow insurance companies to continue offering existing individual plans even if they do not meet the standards set by the new health care law. Note, however, that certain provisions of the ACA had to be inserted into these plans. Unfortunately, some people who chose to keep these plans are actually paying more for less benefits

than they would have been paying if they had shopped around on the Insurance Exchange to compare their existing plan with the other ACA compliant plans that were available.

Individuals would be well advised to contact a licensed insurance broker to compare their existing non-conforming insurance plan with the other ACA conforming plans that are available, in order learn whether they may be better served with another conforming plan that may provide more benefits for the same or less money. Individuals can choose to end their non-conforming policies early, and enroll in an ACA conforming plan by March 31, 2014, which is the end of open enrollment.

Additionally, if persons with non-conforming plans that were terminated do not wish to pay the additional monies that a qualified health plan may cost, they may go to the Insurance Exchange or directly to a carrier, and select a catastrophic plan that does conform with the ACA.

If you are a Large Employer and are concerned that the insurance plan you offer may not be compliant with the ACA, you can reach out to a licensed insurance broker to have your plan evaluated to determine whether it is or is not compliant with the ACA, and you can also double-check directly with your insurance carrier.

F. Penalty provisions?

Section 4980H of the Internal Revenue Code generally provides that:

> an applicable large employer is subject to an assessable payment if either (1) the employer fails to offer to its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage (MEC) under an eligible employer-sponsored plan and any full-time employee is certified to the employer as having received an applicable premium tax credit or cost-sharing reduction (section 4980H(a) liability), or (2) the employer offers its full-time employees (and their dependents) the opportunity to enroll in MEC under an eligible employer-sponsored plan and one or more full-time employees is certified to the employer as having received an applicable premium tax credit or cost-sharing reduction (section 4980H(b) liability). ….
>
> An employer may be liable for an assessable payment under section 4980H(a) or (b) only if one or more full-time employees are certified to the employer as having received an applicable premium tax credit or cost-sharing reduction.
>
> The assessable payment under section 4980H(a) is equal to the number of all full-time employees (excluding 30 full-time employees) multiplied by one-twelfth of $2,000 for each calendar

> month, while the assessable payment under section 4980H(b) is based on the number of full-time employees who are certified to the employer as having received an applicable premium tax credit or cost-sharing reduction with respect to that employee's purchase of health insurance for the employee on an Affordable Insurance Exchange (Exchange) multiplied by one-twelfth of $3,000 for each calendar month.
>
> In no case, however, may the liability under section 4980H(b) exceed the maximum potential liability under section 4980H(a).
>
> Generally, liability under section 4980H(b) may arise because, with respect to a full-time employee who has been certified to the employer as having received an applicable premium tax credit or cost-sharing reduction, the coverage offered by the employer is not affordable within the meaning of section 36B(c)(2)(C)(i) or does not provide minimum value (MV) within the meaning of section 36B(c)(2)(C)(ii). An employee's receipt of a premium tax credit under section 36B (premium tax credit) with respect to coverage for a dependent only will not result in liability for the employer under section 4980H.

https://www.federalregister.gov/articles/2014/02/12/2014-03082/shared-responsibility-for-employers-regarding-health-coverage; See also 26 U.S. Code §4980H (a) and (b), http://www.law.cornell.edu/uscode/text/26/4980H.

The IRS will send Employers a Section 1411 Certificate informing them that an employee has received a Premium Assistance Tax Credit in connection with the purchase of health insurance on a state Insurance Exchange, and informing the Employers of their potential liability for tax penalties in connection with the same, and provide them with an opportunity to respond before any liability is assessed or notice and demand for payment is made.

Note that while part-time employees are included to determine if an employer has at least 50 full-time equivalent employees, and is thus considered a “Large Employer” for the purpose of the application of the penalty, the actual penalty itself is levied only with regard to full-time workers, and not also with regard to part-time workers.

G. Reporting requirements for applicable large employers

Section 6056 of the ACA directs:

> an applicable large employer to file a return with the IRS that reports, for each employee who was a full-time employee for one or more months during the calendar year, certain information described in section 6056(b) about the health care coverage the employer offered to that employee (or, if applicable, that the employer did not offer health care coverage to that employee). Section 6056 also requires applicable large employers to furnish,

> by January 31 of the calendar year following the calendar year for which the return must be filed, a related statement described in section 6056(c) to each full-time employee for whom information is required to be included on the return. On September 5, 2013, the Treasury Department and the IRS released a notice of proposed rulemaking (REG-136630-12, [78 FR 54996]) providing guidance under section 6056, including a description of and request for comments on certain simplified reporting methods under consideration by the Treasury Department and the IRS.

See https://www.federalregister.gov/articles/2014/02/12/2014-03082/shared-responsibility-for-employers-regarding-health-coverage.

H. The 90-day limit on waiting periods

Section 2708 of the Public Health Service Act ("PHS") provides that:

> for plan years beginning on or after January 1, 2014, a group health plan or health insurance issuer offering group health insurance coverage may not apply any waiting period that exceeds 90 days. Section 2704(b)(4) of the PHS Act, section 701(b)(4) of ERISA, and section 9801(b)(4) define a waiting period to be the period that must pass with respect to an individual before the individual is eligible to be covered for benefits under the terms of the plan. Section 2708 of the PHS Act does not require the employer to offer coverage to any particular employee or class of employees, but prevents an otherwise eligible employee (or dependent) from waiting more than 90 days before coverage becomes effective.
>
> Notice 2012-59 (2012-41 IRB 443), and parallel guidance issued by the Department of Labor (DOL) and HHS, provide temporary guidance on compliance with section 2708 of the PHS Act and provide that this temporary guidance remains in effect at least through the end of 2014. (*See* Department of Labor Technical Release 2012-02 (http://www.dol.gov/ebsa/newsroom/tr12-02.htmland).
>
> On March 21, 2013, the Treasury Department, DOL, and HHS (the Departments) issued a notice of proposed rulemaking (REG-122706-12, 78 FR 17313) providing guidance under section 2708 of the PHS Act. In the preamble to the proposed regulations under section 2708 of the PHS Act, the Departments state that, in their view, the proposed regulations are consistent with, and no more restrictive on employers than Notice 2012-59 (and the parallel guidance issued by DOL and HHS) and further state that the Departments will consider compliance with the proposed

> regulations as compliance with section 2708 of the PHS Act at least through the end of 2014.
>
> Under the section 4980H final regulations, there are times when an employer will not be subject to an assessable payment with respect to an employee although the employer does not offer coverage to that employee during that time. However, the fact that an employer will not owe an assessable payment under section 4980H for failure to offer coverage during certain periods of time does not, by itself, constitute compliance with section 2708 of the PHS Act during that same period.
>
> (The Departments expect to issue final regulations in the near future with respect to section 2708 of the PHS Act. As stated in the proposed rules, the Departments will consider compliance with the proposed regulations under section 2708 of the PHS Act as compliance with section 2708 of the PHS Act through at least 2014 and, to the extent final regulations are more restrictive on plans and issuers, the final regulations will not be effective prior to January 1, 2015. 78 FR 17317 (March 21, 2013).)

See https://www.federalregister.gov/articles/2014/02/12/2014-03082/shared-responsibility-for-employers-regarding-health-coverage.

Note that "[t]he Affordable Care Act adds section 9815(a)(1) to the Code and section 715(a)(1) to the Employee Retirement Income Security Act (ERISA) to incorporate the provisions of part A of title XXVII of the PHS Act into the Code and ERISA, and to make them applicable to group health plans and health insurance issuers providing health insurance coverage in connection with group health plans. The PHS Act sections incorporated by these references are sections 2701 through 2728." *Id.*

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and Theresa Niland, Blue Cross Of Idaho

> Due to the Obama Administration's recent delay and phasing in of certain aspects of the Employer Mandate, as well as the continual regulatory changes that have frequently occurred in connection with the implementation of the ACA, I encourage companies to take an active approach to stay compliant with the ACA and informed as to any changes that may have taken place. In this regard, it is best to utilize the services and knowledge of your licensed insurance broker, insurance carrier, and Certified Public Accountant to ensure that your insurance programs are compliant with the ACA.

Those Large Employers who do not currently have a group plan should reach out to a licensed insurance broker or directly to an insurance carrier, to learn if and when they will be required to have a group plan.