EMPLOYMENT LAW UPDATE

2014

HOLLAND & HART LLP

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2014

Are You Ready? Next Wave of Healthcare Reform

HOLLAND & HART LLP

Speakers

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Roadmap

- Goal: Highlight most important practical considerations for employers
- Shared responsibility overview
- Focus areas for employers
- Compliance strategies

SHARED RESPONSIBILITY OVERVIEW

Big Picture

- Effective January 1, 2014:
  - **Individual mandate** forces most employees to obtain coverage or pay a tax
  - **Insurance marketplaces** (aka exchanges) became available for individuals to obtain coverage
  - Individuals with household income of up to 400% of the poverty level ($95,400 for a family of 4 in 2014) and who are not eligible for qualifying coverage from an employer will be eligible for **premium assistance** for exchange coverage
- Delayed effective dates:
  - **Shared responsibility** requires employers to provide coverage to employees or pay a shared responsibility penalty (effective January 1, 2015 or later)
  - **SHOP exchanges** allow small employers to obtain coverage (effective January 1, 2015 or later)

Large Employer Status

- The shared responsibility penalties only apply to **large employers**
- You are a large employer if you average 50 or more full-time equivalents (FTEs) per month in the prior year
  - Transition relief increases the threshold to 100 or more FTEs for 2015 (see below)
- FTE calculation based on 30 hours per week
- Determined on a controlled group basis
- If an employer has 50 employees or more for 4 or fewer months because of **seasonal employees**, the seasonal employees may be disregarded

Large Employer Status

- Transitional relief
  - For 2015, the large employer threshold is increased from 50 to 100 or more FTEs in 2014 if the employer does not:
    - Decrease its workforce in order to avoid large employer status for 2015, or
    - Reduce or eliminate coverage through the end of the 2015 plan year
    - Employer will have to certify eligibility for transition relief on Form 1094-C
  - Also for 2015, employers can determine their average FTEs over any consecutive 6 months in 2014

Shared Responsibility Penalties

- Large employers may be subject to 1 of 2 penalties
  - **No coverage penalty** - $2,000 per employee (less 30 employees) unless minimum essential coverage is offered to 95% of employees and their dependents (**all or nothing**) or
  - **Insufficient coverage penalty** – If employer offers coverage, but coverage is either not affordable or does not have minimum value, $3,000 per employee that obtains premium assistance on an exchange
- Transitional relief for fiscal year plans – penalties generally do not begin to apply until the plan year beginning in 2015
  - Plan year must have been in place on December 27, 2012
  - Special rules for newly eligible employees

Shared Responsibility Penalties

- Calculated on a monthly basis
  - Coverage generally must be offered every day during a month to avoid penalties, except
    - Coverage may begin mid-month if employment began mid-month
    - Coverage may end mid-month because of termination of employment if coverage would have extended to the end of the month but for the termination

Shared Responsibility Penalties

- For determining whether an employer is a large employer subject to shared responsibility, employees include all "common law" employees in the same "controlled group" and/or "affiliated service group"
- However, penalties are calculated and assessed on an employer-by-employer basis
  - 95% threshold is calculated separately for each employer
  - 30 full-time employee reduction for the no coverage penalty is allocated pro rata between the members of the controlled group based on the number of each employer's full-time employees (rounded up)
  - Each employer's liability is based only on its employees
  - **Planning opportunity**: split non-covered employees into separate entity

No Coverage Penalty

- Applies if
  - Employer fails to offer **minimum essential coverage** to 95% of its full-time employees and their dependents (spousal coverage not required) and
  - One or more full-time employees obtain **premium assistance**
- Minimum essential coverage includes all employer-provided group medical coverage except:
  - Limited scope dental or vision benefits
  - Coverage only for a specified disease or illness
  - Long-term care insurance
  - Other insurance coverage under which health care is not the primary benefit

No Coverage Penalty

- Transition relief for plan year beginning in 2015
  - 95% threshold lowered to 70% (insufficient coverage penalty still applies)
  - 80 full-time employees are excluded from penalty calculation rather than 30
  - For plans that currently do not cover dependents, dependent coverage not required for 2015 plan year if employer takes steps in 2014 and 2015 to offer dependent coverage

Insufficient Coverage Penalty

- Applies if coverage is offered but is not **affordable** or does not have **minimum value**
- Minimum value
  - A plan has minimum value if it pays 60% or more of the expected costs of medical benefits (determined actuarially)
  - Calculation methods:
    - Minimum Value calculator provided by HHS: http://cciio.cms.gov/resources/files/mv-calculator-final-2-20-2013.xlsm
    - Safe harbors established by HHS/IRS
    - Certification by actuary
  - Insurers/brokers/TPAs can often tell you if your plan has minimum value

Insufficient Coverage Penalty

- Affordability
  - Coverage is not affordable if the employee's premium for employee-only coverage exceeds 9.5% of the employee's household income
  - Safe harbors available
    - Guaranteed affordability if employee-only premium is 9.5% or less of the federal poverty line for a single individual (2014 federal poverty line for a single individual is $11,670, making coverage affordable if it is $1,108.65 per year or less – $92.38 per month)
    - Other safe harbor require close analysis of workforce

Identify Full-Time Employees

- Potentially biggest administrative burden – identify full-time employees
- Why
  - For all employees not offered coverage, the employer will be subject to a penalty unless it can show that the employee was not full-time under the IRS rules (burden on employer)
  - May include workers not currently treated as employees, but that are common law employees
    - Independent contractors, leased employees, short-term/temporary employees
    - PEO relationships
    - Interns, externs, volunteers
    - (Sole proprietors, partners in a partnership, 2% S corporation shareholders and leased employees are not considered employees)
  - Different full-time threshold than used historically (30 hours per week)
  - IRS rules for determining full-time status are complicated and unfamiliar

Identify Full-Time Employees

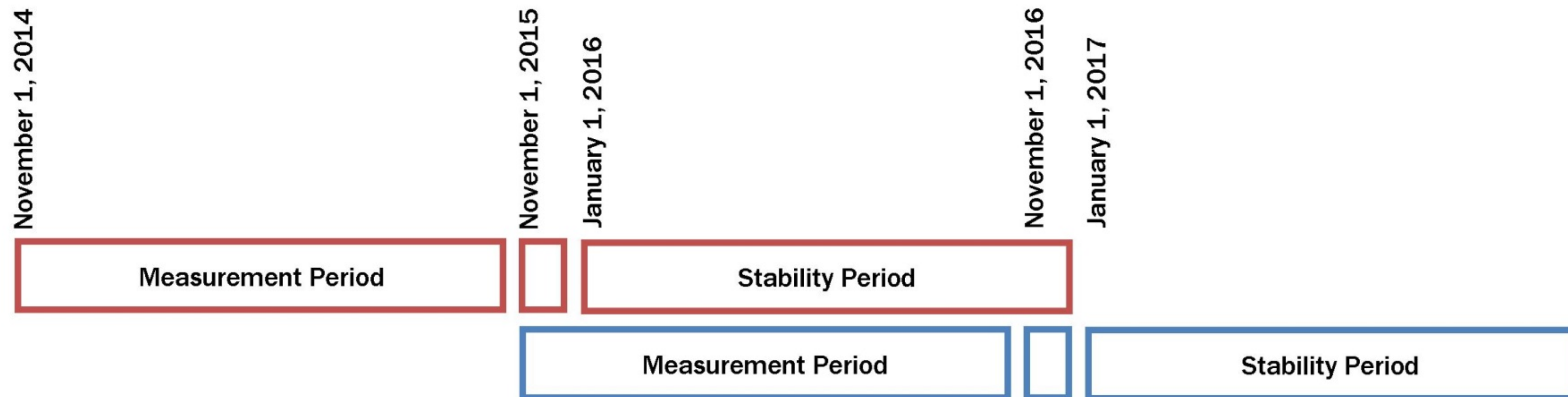
- **Best practice: written policy describing how full-time employee status is determined**
- Identify all employees that you do not need to track
  - Most employers have a large group of employees that are easily identified as full-time - no extra tracking of these employees is required (offer coverage or pay a penalty)
  - No tracking required for employees that are offered affordable, minimum value coverage for the employee and dependents
- For the remaining employees, the IRS has adopted 2 methods employers may use to determine full-time employees
  - Look-back measurement method
  - Monthly measurement method

FULL-TIME EMPLOYEE TRACKING

Look-back Measurement Method

- For ongoing employees, employers establish standard measurement periods, administrative periods and stability periods
  - **Standard measurement period** – Between 3 and 12 months during which the employer counts hours to determine whether an employee is a full-time employee (**can begin and end with payroll period)**
  - **Standard administrative period** – Up to 90 days between measurement period and stability period for calculating full-time status and open enrollment
  - **Standard stability period** –Generally the same length as the measurement period during which employees that averaged 30 hours per week during the measurement period are treated as full-time employees (**must be based on calendar months)**

Look-back Measurement Method



- It often makes sense to use the plan year as the stability period and coordinate measurement periods and administrative periods accordingly
- Employees who change employment status during a stability period will not lose coverage until the end of the stability period

Look-back Measurement Method

- New employees
  - If reasonably expected to work 30 or more hours per week during initial measurement period, new employee is treated as full-time from first day of employment (penalties apply unless coverage is offered within 90 days)
    - New temporary and short-term employees expected to work 30 or more hours per week are full-time for this purpose
  - Other employees may be excluded without penalty during initial measurement period, including
    - Variable hour employees
    - Part-time employees
    - Seasonal employees (hired at the same time each year and customary annual employment of 6 months or less)

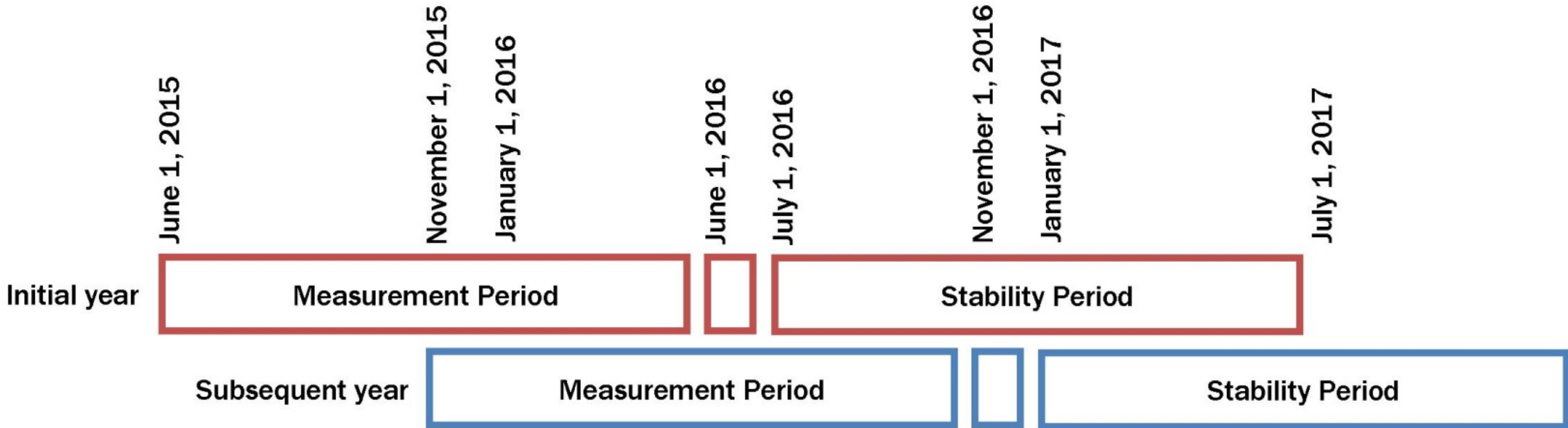
Look-back Measurement Method

- Factors for determining whether employee is expected to work 30 or more hours per week
  - Hours worked by employee being replaced
  - Whether hours vary for employees in comparable positions
  - Advertised hours requirement in job posting
- Cannot take into account likelihood that employee will be employed through initial measurement period
- A temp agency hiring an employee for placement with another entity may also take into account whether other employees in the same position
  - Can reject temporary placements
  - Typically have periods with no placement
  - Are typically offered placements for differing periods of time
  - Are typically offered placements for less than 13 weeks

Look-back Measurement Method

- For new non-full-time employees
  - **Initial measurement period** – Between 3 and 12 months; can begin as late as the beginning of the month following hire, but delay is counted against 90 days for administrative period
  - **Initial administrative period** – Up to 90 days, but stability period must begin no later than the 1st day of the second month following the anniversary of the employee's hire date
  - **Initial stability period** –Generally the same length as the standard stability period

Look-back Measurement Method



Look-back Measurement Method

- Changes in employment status
  - Generally, coverage is based on measurement periods and stability periods, regardless of an employee's change in employment status
  - Special rule if a part-time employee increases hours during the initial measurement period and is reasonably expected to be full-time: coverage must begin as of the earlier of
    - The first day of the fourth calendar month following the change in status, or
    - The beginning of the initial stability period (if the employee would otherwise have been full-time for the stability period)

Look-back Measurement Method

- Transition relief
  - 12-month stability periods generally require 12 month measurement periods, but for stability periods beginning in 2015 only, measurement periods can be shorter than stability periods if:
    - They are between 6 and 12 months
    - They begin no later than July 1, 2014
    - They end no earlier than 90 days before the first day of the plan year beginning on or after January 1, 2015

Monthly Measurement Method

- An employee is full-time for a month if he or she works 130 or more hours during the month
  - Can calculate based on weekly periods
    - If a month has 4 weeks, an employee who works 120 or more hours is full-time
    - If a month has 5 weeks, an employee who works 150 or more hours if full-time
  - No special rules for seasonal, part-time or variable hour employees
- First three months free rule
  - The no coverage penalty will not apply for the first month an employee is determined full-time under this method or the next 2 months as long as
    - Coverage is offered effective as of the first day of the fourth month
  - The insufficient coverage penalty will also not apply during the three-month period if the offered coverage has minimum value
  - May only be used once per employee (unless the employee is rehired after a significant break in service – see below)
  - Must also comply with 90-day waiting period rules

Monthly Measurement Method

- Example
  - Plan provides that employees become eligible after they work 130 hours in a month – coverage is effective as of the first of the month following a 2 month waiting period
  - Employee is hired January 1, 2016 and works 100 hours per month for several months
  - On June 1, 2016, the employee is promoted and begins working more hours
  - In June 2016, the employee first exceeds 130 hours in a month
  - Two-month waiting period begins July 1, 2016 and minimum value coverage is offered effective as of September 1, 2016
  - No penalties will apply with respect to the employee in June through August 2016
  - If the employee's hours are later reduced below 130 per month, coverage can be dropped, but penalties could apply if the employee ever again exceeds 130 hours in a month that he has not been offered coverage

Monthly Measurement Method

- Advantage
  - Can drop coverage for employees that change to part-time without waiting until the end of the stability period
- Disadvantage
  - Other than first three months free rule, employers don't know whether employees are full-time until after the fact
- Practical use – employers that do not want to administer measurement/stability periods and
  - Have workforces with consistent hours
  - Have workforces with almost all full-time employees
  - Decide to pay the penalty

Rehires

- Employees who perform no services for an employer for 13 consecutive weeks are treated as new hires
- **Rule of parity** – If employment prior to service break was less than 13 weeks, employee will be treated as new hire if service break was
  – At least 4 weeks and
  – Longer than the length of employment before the break in service

Counting Hours of Service

- Basics
  - For hourly employees, use actual hours worked
  - For salaried employees, may use actual hours or equivalencies of 8 hours per day or 40 hours per week (as long as no undercounting)
  - In addition to hours worked, must count hours during paid leave (for example, vacation leave, sick leave)
- Special rules for counting hours
  - Hours of employees working for multiple employers in a single controlled group are aggregated (special rules apply for allocating any penalty for such an employee between employers)
  - FMLA, USERRA leave – must credit hours at the average rate when not on leave (does not apply for monthly measurement method)
  - Education organizations – must credit hours at the average rate when not on summer or other break
  - Adjunct faculty – safe harbor of 2 ¼ hours per hour of class

Counting Hours of Service

- Special rules for counting hours (cont.)
  - On-call hours – use reasonable method (paid hours and hours required to be spent at employer's premises must be counted)
  - Commissioned salespeople – must take into account travel time
  - Layovers in the airline industry – "away from home" rule
  - Students
    - Hours worked in internship/externship program counted by employer (not educational institution)
    - Hours worked under federal or state-sponsored work-study program not counted
  - Volunteers – hours worked not counted if no compensation other than
    - Reimbursement of reasonable expenses and
    - Reasonable benefits and nominal fees customarily paid to volunteers
  - Members of religious orders – hours worked by individuals subject to a vow of poverty not counted
  - Otherwise, reasonable method required when regular rules will underreport

ACA REPORTING

New Annual Reporting

- ACA includes 3 new programs that the IRS has to administer
  - Individual mandate penalty
  - Shared responsibility penalty
  - Premium tax credits
- Sources of information for administration of these programs
  - Exchanges
  - Individual income tax returns
  - Employers

New Annual Reporting

- Employers are subject to 2 new reporting requirements which both involve providing a report to IRS and statements to individuals (similar to process for W-2s)
  - IRC Sec. 6055 – disclose who received minimum essential coverage from the employer (for individual mandate tracking)
  - IRC Sec. 6056 – disclose
    - Whether the employer satisfied the shared responsibility requirements and
    - Whether employees were eligible for premium tax credits
- We finally have final regulations, forms and instructions
- All reporting is for calendar year (rather than plan year)
- Voluntary for 2014

6055 Reporting

- Who reports?
  - Insurer for insured plans
  - Sponsor for self-insured plans
    - Regardless of the number of employees
    - No reporting required for FSAs, HRAs and other HIPAA-excepted benefits
- What information is reported?
  - Name, address and EIN of reporter
  - Name and SS# of covered individuals
  - Name and SS# of employee who individuals receive coverage through
  - Months covered
  - Insurers also report name of employer and whether coverage was obtained on a SHOP exchange

6055 Reporting

- Controlled groups
  - If a controlled group constitutes a large employer for shared responsibility purposes, each employer in the controlled group must report separately
  - Otherwise, members of a controlled group can either report separately or as a group

6055 Reporting

- Individual statement
  - Only needs to be provided to employees (not covered spouses or dependents)
  - Must include contact person at sponsor
  - Due by **January 31** – subject to rules similar to Form W-2s
  - 30-day extension available with good cause
- IRS return – Form 1095-B
  - Due by March 31 if filed electronically (otherwise, February 28)
  - 30-day automatic extension available as well as an additional 30-day extension with explanation of need

6056 Reporting

- Who reports?
  - All employers in controlled groups that are large employers for shared responsibility purposes
    - Including employers with between 50 and 100 FTEs for 2015 -- must also certify they are eligible for the transitional relief

6056 Reporting

- What information is reported?
  - Name, address and EIN of employer
  - Name and telephone number of contact person
  - Year (must be calendar year regardless of plan year)
  - Certification (by month) as to whether employer offered minimum essential coverage to all full-time employees and dependents
  - Months minimum essential coverage was available
  - Full-time employee's monthly premium for lowest cost self-only coverage providing minimum value
  - Number of full-time employees by month
  - Name, address and SS# of each full-time employee covered during the year and months not covered

6056 Reporting

- What information is reported? (cont.)
  - Whether coverage had minimum value
  - Whether spouse was offered coverage
  - Total number of employees, by month
  - Whether date of coverage was affected by a waiting period
  - Names and EINs of other employers in the employer's controlled group
  - Satisfaction of an affordability safe harbor
- Simplified reporting may apply if an employer offers minimum value coverage that is affordable to all or substantially all of its full-time employees for the entire year

6056 Reporting

- Individual statement
  - Due by **January 31** – subject to rules similar to Form W-2s
  - 30-day extension available with good cause
- IRS return – Form 1095-C
  - Similar to W-2 reporting, use separate return for each full-time employee and file transmittal (Form 1094-C) with all returns filed
  - Due by March 31 if filed electronically (otherwise, February 28)
  - 30-day automatic extension available as well as an additional 30-day extension with explanation of need
- Combined reporting
  - If an employer is required to report under both 6055 and 6056, only Form 1095-C is required (no Form 1095-B is required)

COMPLIANCE STRATEGIES

Managing Risk

- Large employers (with 200 employees or more, depending on workforce) have traditionally been able to limit health plan costs because
  - They have sufficient participant numbers to spread risk and self insure
  - The more participants in a plan, the less a few sick employees affect the cost of the plan
- Under ACA, many small employers have found coverage more affordable (or have at least seen lower year-to-year cost increases) because ACA
  - Limits insurers' ability to price insurance in the small group market (employers with 50 or fewer employees) based health factors and
  - Requires insurers to spread risk across all small group plans

Unintended Consequences

- Many mid-size employers (larger than 50 employees but not large enough to benefit from the natural risk spreading of large plans), however, continue to see significant increases in the cost of coverage
  – Even as they become subject to ACA mandates that require them to provide coverage and limit their flexibility
- As a result, we see many employers and brokers exploring alternative health care arrangements

Strategic Considerations

When evaluating a health plan strategy for 2015 and beyond consider

- Hard factors
  - Potential cost of the shared responsibility penalties (up to $2,000 per full-time employee)
  - Penalties are not deductible
  - Additional compensation cost of making employees whole (on an after-tax basis) if coverage is dropped
- Soft Factors
  - Impact on recruiting and retaining employees
  - Plan designs that increase the risk of penalties
  - Discrimination rules (scheduled for 2015)

Coverage Options – Play

Play – Offer all full-time employees coverage that fully satisfies the shared responsibility requirements (minimum essential coverage, minimum value, affordable)

- Pro
  - Employer avoids penalties
  - Employees have the option of high quality benefits
- Con
  - Cost of providing affordable, minimum value coverage may be more expensive than penalties
  - Cost of coverage may be especially expensive if take up rate is expected to be low (restaurants, staffing firms, etc.)
  - In order to keep plan affordable, employer pays cost of increases in health costs
  - Employer may have to expand coverage to a broader population to cover all full-time employees
  - Full-time employees can be hard to identify, especially if the employer has a fluctuating workforce

Coverage Options – Play

- Type of employers that may implement this option
  – Larger employers, often with self-insured plans, that have more control over costs and plan design
- Variation – Make unaffordable for low-income employees so that they can obtain exchange subsidies
- Variation – Offer coverage to all employees so you don't have to track full-time employees
- Variation – May be able to reduce cost of coverage by limiting provider networks

Coverage Options – Pay

Pay – Drop health coverage and send all employees to the exchange

- Pro
  - Cost of shared responsibility penalties plus increase in wages to partially offset lost medical benefits may be less than the cost of complying with the shared responsibility requirements
  - Additional cost savings may come from reducing other administrative costs (recordkeepers, consultants, lawyers, benefits personnel)
- Con
  - Shared responsibility penalties are not deductible
  - Makes recruiting and retention more difficult, particularly recruiting and retaining senior management and other hard-to-recruit employees
  - Does not eliminate employee tracking and reporting obligations (still need to identify full-time employees for calculation of penalty)

Coverage Options – Pay

- Type of employers that may implement this option
  - Employers that currently do not offer coverage to a significant portion of their workforce
  - Employers with a small potential shared responsibility penalty
  - Employers who will have to make significant plan changes to comply with shared responsibility

Coverage Options – Skinny Plan

Skinny plan – Offer a plan that only provides coverage for preventative care, known as a skinny plan (most products also include minimal additional benefits such as limited wellness programs or hospital or fixed indemnity features)

- Pro
  - Constitutes minimum essential coverage and satisfies no coverage penalty
  - Insufficient coverage penalty does not apply to employees that do not obtain premium subsidies on an exchange (young, healthy employees and high-paid employees)
  - Low cost and/or may be able to push entire cost to employee
  - Satisfies <u>individual</u> shared responsibility requirement for employees that elect coverage
- Con
  - No protection for minor illness or injury
  - May be confusing/misleading to some employees
  - Does not provide minimum value and insufficient coverage penalty applies for all employees that obtain subsidized exchange coverage
  - Penalties could be as high as no coverage penalty, which, in addition to the cost of the skinny plan, could exceed the cost of providing no coverage
  - Not available to employers in the small group market

Coverage Options – Skinny Plan

- Type of employers that may implement this option
  - Employers with a very young, healthy population that is more likely to take advantage of low cost skinny coverage than exchange coverage
  - Employers with employees not eligible for premium assistance on the exchange (high paid or extremely low paid)
  - Employers with high turnover and large number of variable hour employees (temp agencies)

Coverage Options – Combo

Skinny plan/major medical combo – Offer both a skinny plan option and a major medical plan option that is affordable and has minimum value

- Pro
  - Allows employees to purchase the low cost skinny plan to satisfy individual mandate
  - May reduce the number of employees choosing major medical coverage and, as a result, the employer's health costs
  - No shared responsibility penalties
- Con
  - Employees not eligible for premium assistance on an exchange
  - Cost could be high if employees elect major medical coverage rather than skinny plan

Coverage Options – Combo

- Type of employers that may implement this option
  - Employers with a significant amount of young, healthy employees interested in low-cost coverage and a significant amount of more established employees interested in full coverage
  - Employers looking for an insurance policy against missing some full-time employees (workforces with a large number of variable hour employees or high turn over)
- Variation – Offer skinny plan to all employees but limit major medical plan to a specified group of employees (for example, managers and higher employee classifications)
  - Would work for employers with a significant group of management employees and a significant group of highly variable, low paid workers

Coverage Options – Combo

Skinny plan/reimburse for individual insurance combo

- Employer reimbursement for cost of individual insurance
  - Prior to 2014, it was possible through HRAs and similar arrangements to reimburse employees tax-free for premiums paid for insurance purchased on the individual market
  - This strategy became even more attractive with individual exchanges and premium subsidies (potentially in connection with a skinny plan)
- The IRS has issued specific guidance **eliminating this possibility**
  - Employers should be very skeptical about any arrangement allowing tax-free purchase by employees of individual coverage, even in conjunction with a skinny plan
- Possible alternatives
  - Even reimbursement on an after-tax basis is suspect
    - Could be seen as a group health plan violating the ACA prohibition of annual limits
  - Should be fine to provide employees additional compensation in an amount designed to assist in obtaining coverage on the individual market
  - SHOP exchanges are intended to eventually support defined contribution model

Coverage Options – Reference Pricing

Reference pricing models – plan establishes maximum amount it will pay for specific services (for example, knee surgery)

- Pro
  - Can be designed to have minimum value and be affordable (so no penalties)
  - Can significantly reduce cost of coverage compared to major medical
- Con
  - May be hard for participants to find providers
  - Participants may have to pay balance (if balance billing is permitted)
  - Participant education will be needed
  - Interaction with out-of-pocket-limits unclear
  - Generally limited to self-funded plans
- Type of employers that may implement this option
  - Employers large enough for self-funded plans that are interested in aggressively minimizing costs

Coverage Options – Exclude Inpatient

Exclude inpatient hospital coverage – regular major medical coverage except no coverage for inpatient hospital care

- Pro
  - Can be designed to have minimum value and be affordable (so no penalties)
  - Can significantly reduce cost of coverage compared to major medical
- Con
  - No protection for illness requiring inpatient hospital care
  - Participant education will be needed
  - Generally limited to self-funded plans
- Type of employers that may implement this option
  - Employers large enough for self-funded plans that are interested in aggressively minimizing costs

Coverage Options – Use Part-Timers

Reduce full-time employee workforce – Increase number of part-time employees to minimize the number of employees that may trigger shared responsibility penalties

- Pros
  - Minimize shared responsibility penalties
- Cons
  - Potential violation of ERISA duty to administer plans in the best interest of participants, ERISA and ACA whistleblower rules, etc.
  - May create recruiting and retention challenges due to decreased hours offered to workers

Coverage Options – Use Part-Timers

- Type of employers that may implement this option
  - Employers with a large number of variable hour employees that do not currently offer coverage or are experiencing high premium increases (example: school district limiting subs to 4 days a week)
- Variation – Offer skinny plan to ensure compliance with no coverage penalty

Coverage Options – Limit Workforce

Outsource workforce or groups of workers – Engage a PEO or staffing agency to reduce number of full-time employees below the shared responsibility threshold

- Pros
  - Avoid shared responsibility penalties
- Cons
  - PEO structure impacts wide range of business and benefits issues beyond ACA requirements
  - Lose some control over benefits provided to PEO and agency workers (need to pay close attention to the agreement with the PEO or staffing agency)
  - PEO structure is a permanent solution that may be difficult to unwind
  - Staffing agency rules often require replacing workers every 12 months to avoid other benefits and legal issues

Coverage Options – Limit Workforce

- Type of employers that may implement this option
  - Employers not currently providing health coverage that are close to 100 FTEs for 2015 (or 50 FTEs for later years)
  - Larger employers with multiple workforces that vary widely and employment structures that would make outsourcing relatively easy to manage
  - Smaller employers with very flat management and administrative structures that can outsource main operations to a PEO

Thank You!

QUESTIONS?