Top Ten Employer Affordable Care Act Compliance Strategies

Obamacare News You Can Use
By R. Pepper Crutcher, Jr.
Typical Employer Planning Status

- No plan to do anything different.
- Rationale: “I don’t worry ‘bout a thing, ‘cause nothin’s gonna be alright.” (Mose Allison)
- But “no change” may not be an option.
- “Just because you take no interest in politics does not mean that politics will take no interest in you.” (Pericles)
- Inured plan premiums are projected to rise 20% to 60% from 2012 to 2014, perhaps 100% for some small, non-grandfathered employers.
Let the Buyer (of Advice) Beware
Small Employer Exemption

- Annual average of < 50 full time employees (130 “hours of service”/month). Calculate monthly, add, divide by 12.
- $(#\text{full time employees}) + (\text{all others’ hours} / 120)$
- 2014 only: employer may choose any period of at least six months.
- Exclude seasonal employees (up to four months) if they are determinative.
- ERISA controlled group rules
- Predecessor – Successor rules
- Payroll shell game rules
- Break in service rules bar hiring-firing-hiring-firing-firing
4980H(a) Penalty Immunity

- Annual penalty for failure to offer qualifying coverage to at least 95% of FTE’s is a non-deductible tax = $2,000 \times (\text{FTE}# - \text{allocable share of 30})$, calculated monthly.
- If 30 FTE’s and 70 PTE’s, the penalty is $0.00.
- Penalty trigger: an Exchange certification of even one FTE for subsidized QHP purchase.
- In most circumstances, the Exchange must accept the applicant’s (or representative’s) attestation.
- Employer should receive an Exchange certification notice (prompt) and a separate IRS assessment notice (when?).
Pay Penalties in Lieu of Coverage

- **4980H(a)** penalties will be assessed annually, retroactively, per controlled group employer member. One may play, another pay.

- **4980H(b)** “affordability” penalties will be assessed @ $3,000 per Exchange-certified, subsidy-eligible, full time employee (a) whose employer coverage would have cost > 9.5% of household MAGI for the cheapest, self-only coverage, or (b) who were in a group < 5% omitted from the employer offer.

- Safe harbor defenses may not be asserted in a certification appeal but may be assessed in an IRS tax assessment appeal.

- You may be assessed in error even if you “play” nice.
Hire Subsidy Ineligibles.

- Exchange subsidy eligibility certification triggers 4980H penalties.
- Those ineligible for subsidy include:
  - MAGI > 400% of FPL;
  - Those who have or declined affordable, qualifying coverage;
  - Those who have other insurance (including some student health insurance), maybe even if it is not otherwise qualifying – e.g., Indian Health Service;
  - Work-authorized DACA beneficiaries.
- They may buy a QHP through an Exchange, but not with subsidy.
Discriminate Lawfully

- Non-grandfathered, fully-insured plans will be subject to new rules that track the existing self-funded plan rules against discrimination in favor of the highly compensated.

- Offer layered, multiple plans to all eligible employees on the same terms. (Or offer coverage only to the subsidy-eligible “middle class.”)

- That low wage workers choose the cheapest mandated option while executives pick the best is OK, even if the $ amount of employer subsidy is higher on the higher end.

- How low can you go? MEC, MAV, self plus ACA “dependents,” up to 9.5% of compensation (choose option).
Minimize Full Time, Pay Opt-Outs

- 4980H penalties arise from failure to offer qualifying, affordable coverage to full time employees and their dependents. Full time = 130 monthly hours.
- Plus, Exchange subsidy certification.
- Convert full time jobs to part time jobs.
- “Share” employees.
- Pay full time people to opt-out of offered coverage.

Beware:
- You may become uninsurable if too many take the deal;
- HHS may see this as retaliation against those who take the coverage and forfeit the payments.
Lease before Hiring

- ACA maximum waiting period is 90 days.
- Under current guidance, the leasing company is the ACA employer...
- Presumably, of variable hour employees...
- So, lease for at least 90 days (maybe longer), then hire, then impose a second new hire waiting period.
- No current guidance forbids this, but ... CYA.
- “Variable hour” status probably won’t carry-over to the regular employer.
Stack Measurement, Administrative and Waiting Periods.

- Only if “full time” status is genuinely doubtful due to variable monthly hours or seasonal work.
- If so, employer may delay a coverage offer until the end of:
  - A measurement period up to 12 months; plus,
  - A short administrative period; plus,
  - A waiting period.

- No exception for high turnover workforces.

- Beware:
  - Very complex; read the rules;
  - Over-reach will trigger 4980H penalties;
  - Exchange certification will trigger errant IRS assessments.
Maintain Grandfathered Status.

- ACA 1251 – “If you like it, you can keep it.”
- From that baseline, don’t:
  - Eliminate benefits;
  - Raise employees’ % or fixed cost sharing;
  - Raise the co-pay;
  - Raise the employee premium share;
  - Add or raise an annual limit.
- “Grandfathered” means exempt from new PHSAct mandates such as non-discrimination rules for fully-insured plans, cost-sharing and deductible caps, premium “fairness”.
# PHS Act Amendments Breakdown

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<td>No discrimination in favor of the highly compensated (§ 2716)</td>
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<td>[NA: Study and reporting on wellness programs (§ 2717)]</td>
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1 Premium rates may vary according to individual or family coverage, “rating area,” age (up to a 3:1 ration among adults), tobacco use (up to a 1.5:1 ratio).
2 Presently, only insured, small group market plans are subject to the deductible caps, while all non-grandfathered group health plans are subject to the out-of-pocket maximum rules.
3 This already was the law under ERISA for self-insured plans, grandfathered or not.
Establish or Join A Private Exchange.

- The model for many retiree health plans, marketed by Aon-Hewitt, Liazon, Towers Watson and others:
  - Defined benefit becomes defined contribution;
  - Employer HRA contributions fund employee policy purchases.

- Beware:
  - DOL/EBSA FAQ guidance 1/24/13 signals regulatory disapproval of HRA-individual policy integration under ACA 2711 (prohibiting annual benefit limit);
  - Difficult to induce insurers to offer competing group policies;
  - Affordability mandate still would apply.
If Employees Are Union-Represented

- Absent a “clear, unequivocal waiver,” employer must bargain to agreement or deadlock before changing health coverage offerings;

- Arbitrator or NLRB may order restoration, compensation and bargaining;

- Even if Union has waived the right to bargain about the change, employer must bargain about its effects on employees;

- Expect this to take months, so start now.
What We’ve Left Out

Minor Matters:
- Small Employer QHP Exchange Purchases < 2017;
- Expansion of wellness programs and excepted benefits;
- Cadillac tax and pass-through taxes on plan issuers and administrators.

Bigger stuff:
- Consequences of expanding Medicaid MAGI eligibility, or not;
- Consequences of Div. of Medicaid non-cooperation with State Exchange;
- Consequences of federal Exchange administration;
- Issuer, TPA taxes, fees passed-through to employers.
If You Have No ACA Compliance Plan

- Make one, or more. As rules and guidance change, you may need to be nimble.

QUESTIONS?