



# Top Ten Employer Affordable Care Act Compliance Strategies

**Obamacare News You Can Use**

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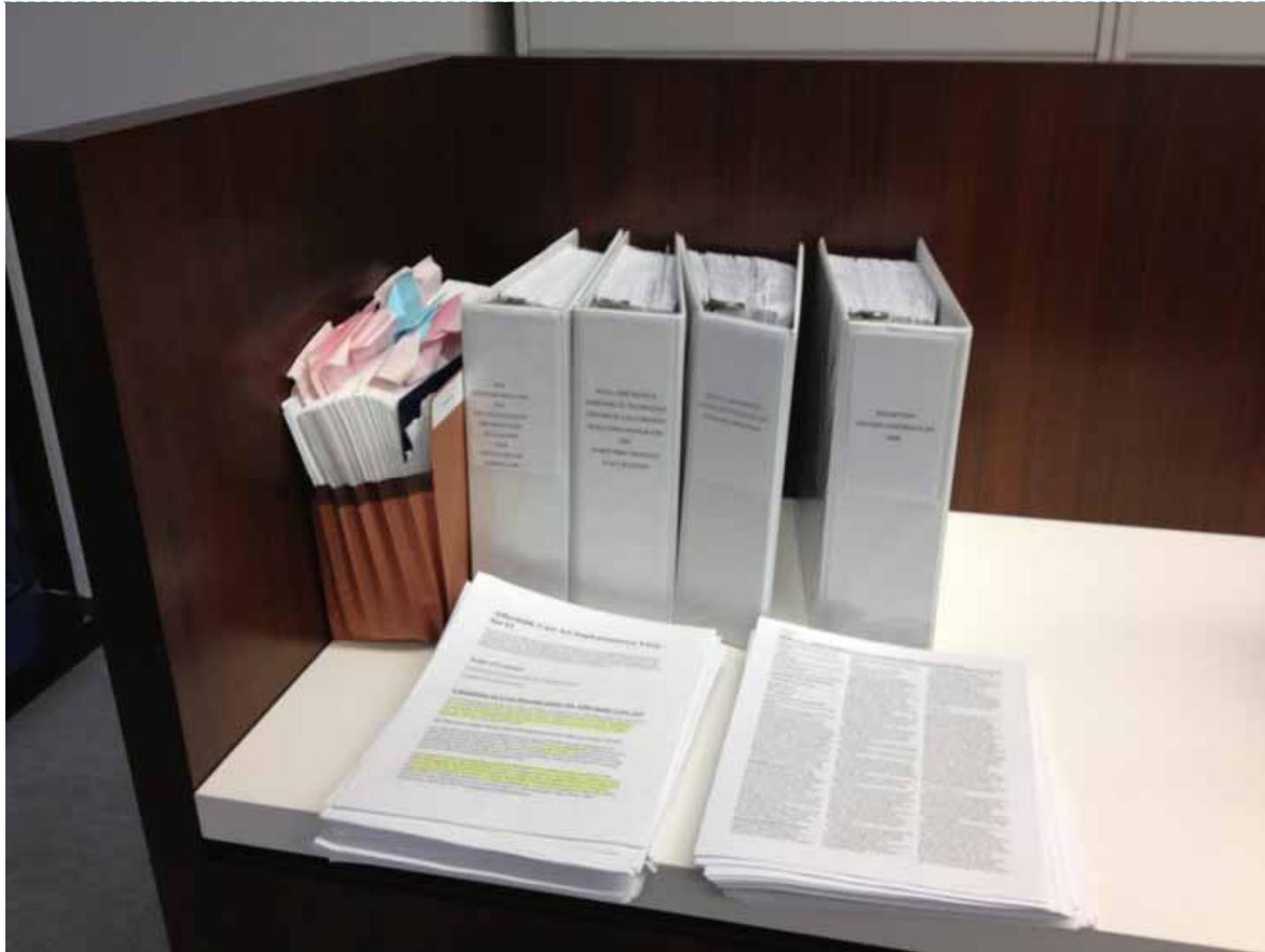
# Typical Employer Planning Status

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- ▶ 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

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- ▶ 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



## 4980H(a) Penalty Immunity

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- ▶ Annual penalty for failure to offer qualifying coverage to at least 95% of FTE's is a non-deductible tax = \$2,000 x (FTE# - 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.

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- ▶ 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

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- ▶ 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

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- ▶ 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

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- ▶ ACA maximum waiting period is 90 days.
- ▶ Under current guidance, the leasing company is the ACA employer . . .
- ▶ Presumably, of variable hour employees . . .
- ▶ Allowing safe harbor “look back” treatment.
- ▶ 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.

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- ▶ 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.

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- ▶ ACA 1251 – “If you like it, you can keep it.”
- ▶ Document coverage as of 3/23/10.
- ▶ 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 PHS Act mandates such as non-discrimination rules for fully-insured plans, cost-sharing and deductible caps, premium “fairness”.



# PHS Act Amendments Breakdown

PHS Act Requirement	NGI	NGSI	GI	GSI
No discriminatory premiums (rating criteria for individual and small group markets) (§ 2701) <sup>1</sup>	X			
Guaranteed issue (individual and small group markets) (§ 2702)	X			
Guaranteed renewal (§ 2703)	X			
No pre-existing condition exclusion (§ 2704)	X	X	X	X
No discrimination based on health status (§ 2705)	X	X		
No discrimination against licensed providers (§ 2706)	X	X		
EHB (individual and small group markets) (§ 2707(a))	X			
Cost-sharing caps (§ 2707(b)) <sup>2</sup>	X	X		
Maximum waiting period (§ 2708)	X	X	X	X
Clinical trial coverage (§ 2709)	X	X		
No lifetime or annual limits (§ 2711)	X	X	X	X
No rescission except for fraud (§ 2712)	X	X	X	X
Preventive services without cost sharing (§ 2713)	X	X		
Adult child coverage to age 26 (§ 2714)	X	X	X	X
Summary of benefits and coverage (§ 2715)	X	X	X	X
No discrimination in favor of the highly compensated (§ 2716)	X	<sup>3</sup>		<sup>3</sup>
[NA: Study and reporting on wellness programs (§ 2717)]	NA	NA	NA	NA
Minimum medical loss ratio and rebates (§ 2718)	X		X	
Internal appeals and external reviews of claim denials (§ 2719)	X	X		

<sup>1</sup> 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).  
<sup>2</sup> 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.  
<sup>3</sup> This already was the law under ERISA for self-insured plans, grandfathered or not.



# Establish or Join A Private Exchange.

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- ▶ The model for many retiree health plans, marketed by Aon-Hewitt, Liason, 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

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- ▶ 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

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- ▶ **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

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

