



**ACA Employer Compliance
Strategies for 2014 - 2015**

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We'll cover . . .

Mandates

- Documentation
- Reporting
- Taxes
- Plan design changes for all group health plans

Options

- Offer MEC?
- Make it affordable, MAV?
- Preserve grandfathered plan status?
- Self-Insure? (Can small TPA's retain provider network access?)
- Establish a Private Exchange?

Traps

- Retaliation, and handling subsidy certification notices
- Leased employees, contractor misclassification (and appealing subsidy certifications)
- Union negotiation duties
- Filing Form 720 but not Form 5500
- "Highly-Compensated Employee" plan discrimination
- Wellness Incentives
- The "Oops" MEWA

Important, but we will ignore . . .

Politics

- The debacle that is healthcare.gov (and the flopped SHOP)
- 2014 elections (and anything beyond 2015, e.g., Cadillac plan tax, IPAB)
- Medicaid expansion and DSH payment reduction controversies
- Competence and security of Navigators
- Executive discretion excesses
- Religious objections to EHB

Individual, Insurer and Provider Effects

- Subsidy calculations
- Individual Mandate taxes and exemptions (e.g., cancellation = “hardship”)
- Health Care Insurance vs. Actual Health Care
- Concierge Care
- Accountable Care Organizations
- Charitable funding of uninsured patient QHP purchases (*East v. BCBS La.*, M.D. La. 3:14cv115)

Litigation

- *Halbig v. Sebelius*, D.C. Cir. No. 14-5018 (argued March 25)
- *Coons v. Lew*, 9th Cir. No. 13-15324 (IPAB challenge case)

Mandated **Documentation**

- ▶ Required to claim grandfathered plan status
 - ▶ Coverages and cost sharing features as of 3/23/10
 - ▶ Records of written grandfathered plan notices to employees
- ▶ Required to defend independent contractor status
- ▶ Required to dispute full-time employee status
 - ▶ Accurate records of “hours of service”
- ▶ Required to dispute subsidy certifications
- ▶ Required to establish FLSA § 218B compliance
- ▶ Summary of Benefits and Coverage (SBC)
- ▶ Notices of material modifications, plan terminations

Mandated **Reporting**

- ▶ Employer W-2 reporting under § 6051(a) (2014)
- ▶ Employer reporting under § 6056 (2015, Reg. § 301.6056-1(d))
 - ▶ “Applicable Large Employers” by 2/28 (3/31 if e-filed)
 - ▶ To IRS and employees (“bubble” certification required)
 - ▶ MEC, employees covered and not covered
 - ▶ Month-by-month, unless . . .
 - ▶ **Simplified annual statement is permitted, because**
 - ▶ Self-only coverage cost capped at \$1,100 (9.5% of FPL);
 - ▶ No family excluded (i.e., spouses).
 - ▶ Then, list names, SSN’s of those with full-year coverage and add month codes for those with part year coverage.

Mandated **Reporting** - continued

- ▶ **Plan (insurer) reporting under § 6055**
 - ▶ To IRS by 2.28 (3.31 if e-filed) but to employees by 1.31
 - ▶ E-file if 250 or more Forms 1095-B or -C
 - ▶ Each MEC plan (**but not MEC supplement plans – e.g. on-site clinics**)
 - ▶ **Not if individual Exchange QHP**
 - ▶ **Not for those who decline coverage**
 - ▶ **Self-insurers may combine their reports.**
 - ▶ **Data: Name and TIN (or DOB) of each “responsible individual,” and of each additional person covered, plus the enrollment months (at least one day), and whether the coverage was purchased through a SHOP.**

Mandatory 2014 Taxes

- ▶ PCORI “Fees”
 - ▶ \$2 per covered life, payable by 7/31/14
- ▶ Reinsurance “Fees”
 - ▶ \$63 per covered life, **invoiced in November, \$52.50 due in January, \$10.50 at year end.**
- ▶ Provider Market Share Taxes
 - ▶ \$8B in 2014, from “contributing entities” with revenues > \$25M in 2013
 - ▶ April notices
 - ▶ August assessments, September payments
 - ▶ Each “contributing entity” must report, whether or not tax is owed (penalties)

Mandated **plan design changes** . . .

- ▶ Modified community rating of small group plans
- ▶ No PEC exclusion
- ▶ Adult child (up to age 26) coverage
- ▶ Maximum “90-day” waiting period
- ▶ Wellness rules (applicable to grandfathered plans under HIPAA)
- ▶ No annual or lifetime limits
- ▶ OOP limits (**deductible limits repealed**)
- ▶ No rescission except for fraud
- ▶ Medical Loss Ratio rebates (insured plans)
- ▶ No more mini-med or stand-alone HRA plans

Option: Offer MEC?

- ▶ In 2015, each “Applicable Large Employer” must offer “Minimum Essential Coverage” to at least 70% of its full time employees or ...
- ▶ Pay a non-deductible tax, assessed in 2016, of \$2,084 per year (monthly) per full time employee (- the first 30) if...
- ▶ At least one of them is certified by an Exchange to buy a QHP with subsidy.
- ▶ Controlled group members may “play or pay” separately, subject to, e.g., § 105(h) rules.
- ▶ Must “offer” coverage, not cover.
- ▶ 26 U.S.C. § 4980H(a)

Option: **Make MEC affordable?**

- ▶ Individual employee cost for cheapest MEC plan capped at 9.5% of MAGI
 - ▶ W-2, Pay Rate and FPL “safe harbors”
 - ▶ Including tobacco-cessation incentives
- ▶ Or ...
- ▶ Pay a non-deductible tax, assessed in 2016, of **\$3,126** per year (monthly) for each employee who instead bought a QHP through an Exchange with subsidy, due to unaffordability of MEC offered
- ▶ 26 U.S.C. § 4980H(b)

Option: **Make MEC MAV?**

- ▶ Statute says the plan must pay at least 60% of the allowed cost of covered services.
- ▶ Agencies say the plan must ...
 - ▶ Push through the online calculator (based on EHB), or
 - ▶ Be a pre-approved template plan, or
 - ▶ Have a specific, actuarial certification, or
- ▶ Pay a non-deductible tax, assessed in 2016, of **\$3,126** per year (monthly) for each employee who instead bought a QHP through an Exchange with subsidy, due to sub-minimum value of MEC offered.
- ▶ 26 U.S.C. § 4980H(b)

Small / Bubble Employer Exemptions

- ▶ One employee's monthly hours



“Special unpaid leave”
accounting upon return
to work.

- ▶ One company's FTE's



- ▶ One controlled group's FTE's



Measurement + Administrative Periods

- ▶ Variable hour and seasonal new hires (vs. 90 day waiting period) + all ongoing employees.
- ▶ Standard Measurement Period 3 to 12 months
- ▶ Administrative Period up to 90 days, but ...
 - ▶ SMP + AP may not last longer than the month that starts after the last day of the max measurement period
- ▶ **Stability Period follows SMP + AP**
 - ▶ At least as long as the SMP
 - ▶ But not less than 6 months
 - ▶ If measured FT, then FT for the whole stability period
 - ▶ If not, then not, unless
 - ▶ Change of position

SMP: June – Nov. 2014

AP: Dec.

SP: Jan. – Dec. 2015

IMP: Oct. 10 – Apr. 10*

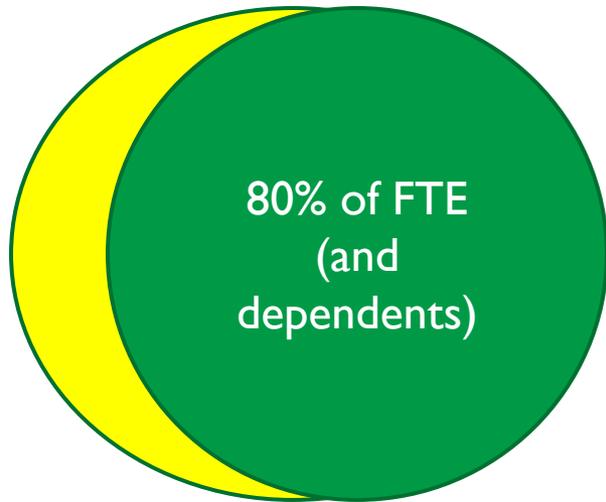
AP: Apr. 10 –
May 30

SMP: Jan. – Sept. 2015

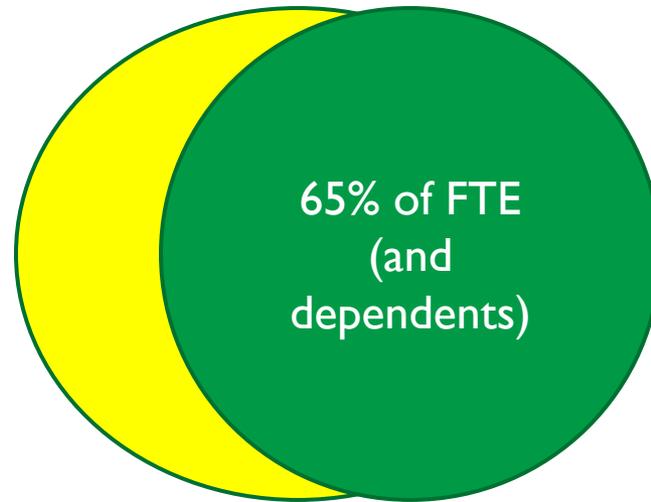
AP: Oct. – Dec. 2015

* If promoted to a full time job on November 2, then entitled to FTE offer by March 1 (the earlier of the first day of the fourth month that begins after the job change or the first date of the calendar month that begins after the end of the IMP + AP).

The Employer Mandate Taxes



No 4980H(a) tax, but
potential 4980H(b) tax
(2016 assessment)



4980H(a) tax and
potential 4980H(b) tax
(2016 assessment)

The Value of Subsidy Ineligibles

- ▶ Exchange subsidy eligibility certification triggers § 4980H penalties. Ineligibles *should* not trigger penalties.
- ▶ Those ineligible for subsidy include:
 - ▶ MAGI > 400% of FPL;
 - ▶ Medicaid eligibles;
 - ▶ Those who have or who 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.
- ▶ **Beware: ineligible FTE' s count for penalty calculation.**

Option: **Forfeit Grandfathered Status**

- ▶ Elimination of benefits to treat a particular condition;
- ▶ Any increase of a % cost-sharing requirement (co-insurance);
- ▶ A fixed amount cost-sharing increase (deductible, out of pocket max) other than a co-pay, greater than the medical inflation rate;
- ▶ A fixed amount co-pay increase more than the greater of \$5 (+ medical inflation) or the max % increase for other fixed amount cost sharing requirements;
- ▶ An employer contribution rate decrease (of the cost of coverage) more than 5 points below what it was on 3/23/10;
- ▶ Imposing an overall limit on the dollar value of benefits (unless the plan had an annual or lifetime limit on 3/23/10);
- ▶ Cutting the annual dollar limit, if the plan limited the dollar value of all benefits on 3/23/10;
- ▶ Transferring employees into the plan from a non-grandfathered plan to avoid related costs or requirements.

Forfeiture Consequences

PHS Act Requirement	NGI	NGSI	GI	GSI
No discriminatory premiums (rating criteria for individual and small group markets) (§ 2701) ¹	X			
Guaranteed issue (§ 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)) ²	X	X		
Maximum waiting period (§ 2708) (not the same as § 4980H)	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 ³	³		³
[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		

- ¹ Premium rates may vary according to individual or family coverage, “rating area,” age (up to a 3:1 ratio among adults), tobacco use (up to a 1.5:1 ratio).
- ² Only insured, small group had deductible caps (since repealed); 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. Daily PHS Act fines may be the only penalty for insured plans.

Option: **Self-Insure**

- ▶ The incredible, shrinking covered life minimum;
- ▶ Stop loss coverage exempt from ACA rules, unless so low that it is deemed a group health plan;
- ▶ Third party administration widely available (including from insurers);
- ▶ Favors young, healthy, low utilization workforces;
- ▶ Facilitates plan design flexibility;
- ▶ Avoids some PHS Act mandates;
- ▶ Carries substantial tail risks;
- ▶ Exposes employer to EBSA plan audits;
- ▶ Small TPA's may lose provider network access.

Option: **A Private Exchange**

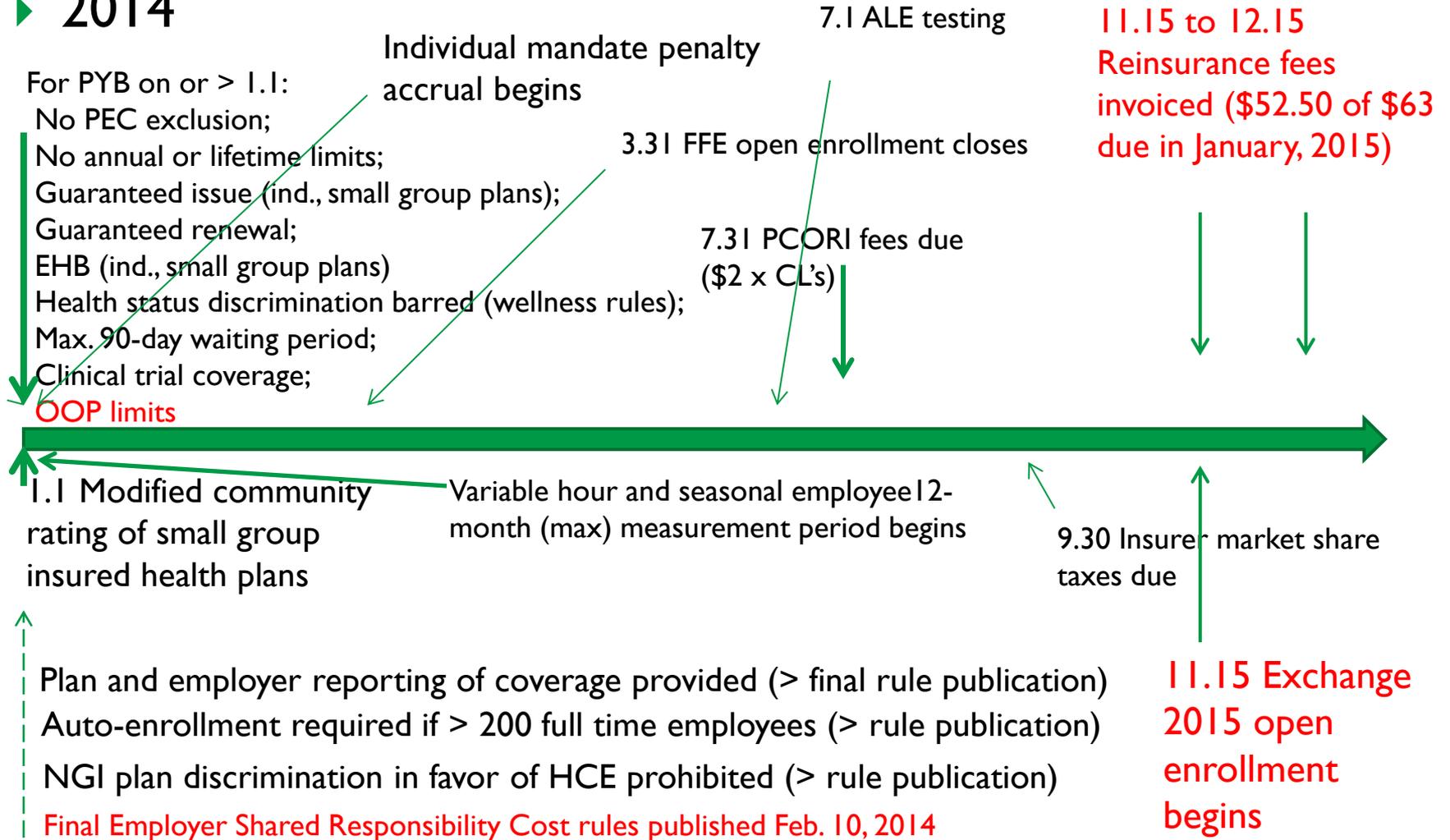
- ▶ A retiree health plan format now offered for active employees by Aon-Hewitt, Mercer, Towers-Watson, Willis
 - ▶ Like the shift from DB to DC retirement plans;
 - ▶ HRA contributions fund employee policy purchases;
 - ▶ Some evidence of reduced HC spending;
 - ▶ Walgreen's, Sears, DineEquity, Petco, Darden Restaurants ...
- ▶ **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.

Trap: **Retaliation**

- ▶ OSHA-administered charge → investigation → hearing process like SOX:
 - ▶ 20 days to defeat preliminary reinstatement;
 - ▶ Heavy employer burden of proof;
 - ▶ Preliminary reinstatement not appealable.
- ▶ **Core concern:**
 - ▶ Employer intimidation of subsidy applicants.
- ▶ **Basic defense strategies:**
 - ▶ Limit access to subsidy application and certification information (two waves, from Exchange, then from IRS);
 - ▶ Don't invite claims – e.g., “We cut your hours due to Obamacare.”

2014 ACA Events

▶ 2014



ACA Events Through 2015 (2:05 – 2:45)

► 2015

1.1 Code 4980H “play or pay” taxes begin (unless “bubble”)

1.1 Variable hour and seasonal employee 12-month (max) measurement period begins

\$52.50 of \$63 reinsurance fees due

7.31 PCORI fees due (\$2 x CL's)

11.15 to 12.15
Reinsurance fees invoiced (\$33 of \$44 due in January 2016)



1.31 – 3.31 Plan and employer information reporting on coverages provided

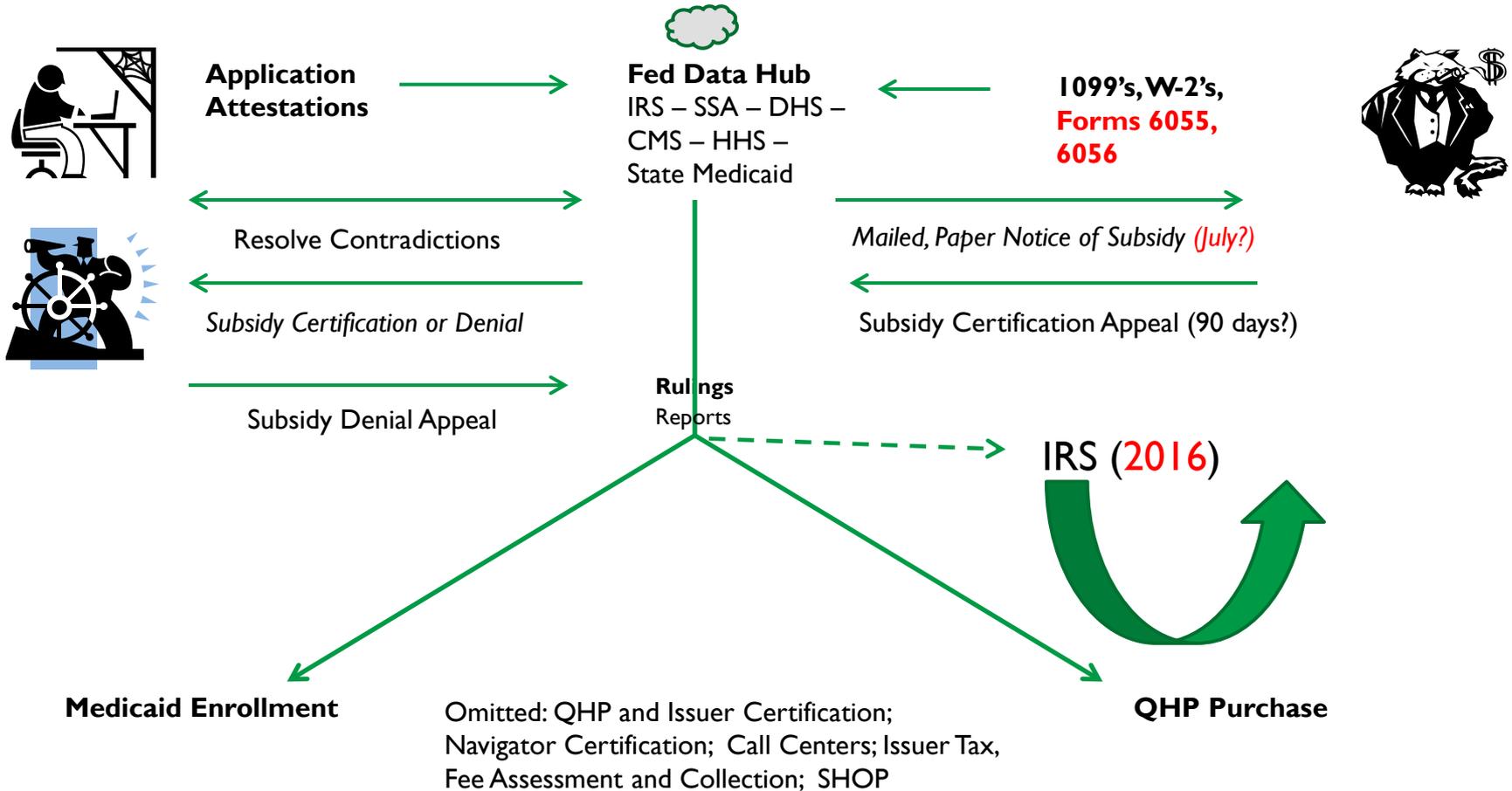
1.31 W-2 reports of value of coverage

9.30 Insurer market share taxes due

Trap: “Contractors”

- ▶ Independent contractor exclusion
 - ▶ Common law test (1970 Rev. Rul.)
 - ▶ Special problems – drivers, PRN nurses, leased employees
- ▶ Maximum 90 day *waiting period* for new hires
 - ▶ Coverage effective by 91st day (even if a holiday)
 - ▶ 1,200 hour + 90 day exception (but not > 13+ months)
 - ▶ One-month “orientation period”
 - ▶ If you don’t recognize him as your new hire ...
 - ▶ Work-around: Leased employees offered coverage by leasing company, with customer surcharge if enrolled. Read the contract carefully, especially claimed indemnity provisions.

Exchanges Flag Misclassifications



Trap: **Union Representation**

- ▶ 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;
- ▶ Contract proposal is not a coverage offer.
- ▶ Union may oppose coverage (§ 4980H(a) tax);
- ▶ Expect this to take months, so start now.

Trap: **Form 5500 vs. Form 720**

- ▶ All but the smallest self-insured group health plans must file Form 5500 ;
- ▶ All self-insured group health plans, even the smallest, must file Form 720 (to pay PCORI fees);
- ▶ DOL and IRS assume, for this purpose, that Form 720 filer should have filed Form 5500.
- ▶ Step 1: inquiry letter
- ▶ Step 2: plan audit (absent a prompt, persuasive explanation)

Trap: **HCE Discrimination**

- ▶ Self-insured plan discrimination favoring the highly compensated makes their benefits taxable income, under 26 U.S.C. § 105(h).
- ▶ ACA extends “similar” rules, **not yet written**, to fully-insured plans
 - ▶ Not applicable to grandfathered plans;
 - ▶ NGL plan sponsor may be fined \$100/day/NHCE.
- ▶ **Self-insured rules are being re-written, too.**
- ▶ That low wage workers choose the cheapest mandated option while executives pick the best is OK. No penalty for discriminating in favor of the lowly compensated.

Trap: **Wellness Incentives**

- ▶ ACA + HIPAA bar discrimination based on health status, HIPAA catching grandfathered plans.
- ▶ Compliance with IRS rules (6/13) is an affirmative defense.
- ▶ “[R]egardless of the type of wellness program, every individual participating . . . should be able to receive the full amount of any . . . incentive, regardless of any health factor.”
- ▶ “participatory” vs. “health-contingent”
- ▶ “activity-only” vs. “outcome-based”
- ▶ OBWIP must include a “reasonable alternative standard.”

Trap: **The “Oops” MEWA**

- ▶ **Multiple Employer Welfare Arrangement**
 - ▶ State insurance law exemption + insolvencies provoked EBSA scrutiny, criminal penalties.
- ▶ **Employees of different employers receive health care benefits incident to their employment, with**
 - ▶ Labor-Management plan exemptions.
- ▶ **Example: on-site clinics shared by employers.**
- ▶ **Example: Employee Assistance Programs?**
- ▶ **Example: Applicable Large Employer splits into “small” employers, defeating controlled group treatment, but the common paymaster buys a large group policy.**

If You Have No ACA Compliance Plan

- ▶ Develop both a compliance plan and a communication plan. You'll need all the time you've been granted.
- ▶ Plan for the administrative burdens, not just the direct costs.
- ▶ Find and fix misclassification problems now.
- ▶ www.acareview.com

The preceding information is not legal advice and should not be substituted for legal advice. Rules change frequently; small fact differences may change obligations materially. Seek competent, current legal advice regarding your specific situation.