Health Care Reform and Higher Education: The Survey Course

September 28, 2017
Agenda

• Health Care Reform
• ACA Employer Mandate Overview
• Employer Mandate Penalties
• Categorizing Employees
• Compliance Strategies
Health Care Reform
Health Care Reform

• January 20, 2017: President Trump Executive Order directs HHS and other federal agencies to:
  – “waive, defer, grant exemptions from or delay implementation of any provision or requirement” of the ACA “to the maximum extent permitted by law.”

• Department of Treasury: Executive Order doesn’t change existing ACA law.
  – “The Executive Order does not change the law; the legislative provisions of the ACA are still in force until changed by the Congress, and taxpayers remain required to follow the law and pay what they may owe.”
Health Care Reform

- Senate prepared its own bill, the Better Care Reconciliation Act (BCRA), but no vote was held.
- July 25: Senate voted to proceed with consideration of AHCA.
- July 26: Senate rejected BCRA
- July 27: Affordable Care Act (ACA) repeal (no replacement plan) was called for a vote – “skinny repeal.”
Health Care Reform

Come on Republican Senators, you can do it on Healthcare. Go For It!

3 Republics beginning to talk Repeal & Replace, the people of our great country are still being forced to live with imploding Obamacare!
Health Care Reform

• “Obamacare implosion” aided by uncertain continued federal government support.
  – Cost share offsets
  – Open enrollment promotion
  – Insurance companies build uncertainty into premiums

• Bipartisan effort in the Senate HELP Committee (Health, Education, Labor and Pensions)
  – State insurance commissioners and governors to discuss ways to stabilize individual market for 2018.

• Repeal ACA by making the states do it?
  – Block grants to cover state exchange costs, exchange subsidies, and Medicaid.
  – Eliminate individual and employer mandate penalties.

• Not much momentum for continued repeal efforts.
ACA Employer Mandate Overview
Employer Mandate Overview

• Applicable Large Employers (ALEs) must offer:
  – Affordable
  – Minimum value coverage
  – To 95% of full time employees
  – And minimum essential coverage to their dependents.

• Affordability only applies to the employee’s cost for self-only coverage.
  – Dependents, spouses, family coverage – no cost-share requirement between employer and employee.
  – Only measured against lowest-cost plan offered

• What is “Minimum Value?”
  – Plan that provides at least 60% actuarial value
  – “Bronze level” plan
Employer Mandate – Affordability

• What is “Affordable?”
  – Employee share of cost for self-only coverage on the lowest offered plan cannot exceed a specified percentage of the employee’s household income:
    - 9.66% in 2016
    - 9.69% in 2017
    - 9.56% in 2018

• 3 Safe Harbors:
  – Federal Poverty Line
  – W-2
  – Rate of Pay
**Affordability**

### Federal Poverty Line
- Cannot exceed 9.56% of mainland poverty line, divided by 12.
- Ex: 2018 FPL: $12,060
- $12,060 x .0956 / 12 = $96.08

### W-2
- Based on box 1 of current year W-2 (modified adjusted gross income)
- Cannot exceed 9.56% of W-2 box 1 wages divided by 12.
- Ex: box 1: $55,000 x .0956 / 12 = $438.17

### Rate of Pay
- Based on the employee’s hourly rate of pay (or monthly salary).
- Cannot exceed 9.56% of rate of pay multiplied by 130.
- Ex: rate: $13/hr x 130 x .0956 = $161.56
Employer Mandate Penalties
Employer Mandate Penalties

- Penalties only triggered if an employee goes to the exchange and receives a subsidy.
  - Subsidies only available to purchasers whose incomes fall between 100% to 400% of the federal poverty line
  - Penalties calculated on a month-by-month basis

• **Subsection A Penalty** (failure to offer coverage to 95% of full-time employees)
  - 2016- $2,160 X each full-time employee minus 30
  - 2017- $2,260 X each full-time employee minus 30

• **Subsection B Penalty** (failure to offer affordable coverage)
  - 2016- $3,240 per employee who received an exchange subsidy
  - 2017- $3,390 per employee who received an exchange subsidy
Employer Mandate Penalties

- Assessed by IRS based on 1094/1095 forms filed by all Applicable Large Employers (ALEs)

- 1094: Transmittal Page (Cover page)
  - Information about: the employer, employees (aggregate), and employer’s affiliated entities (if any).

- 1095: Specific coverage information for each full time employee
  - Coverage information reported for each month.
  - Codes to indicate coverage situation each month.
Categorizing Employees
Categorizing Employees

• Employers have 2 options:
  – **Full Time**: employer reasonably believes the person will work 30+ hours per week on average.
  – **Variable Hour**: if the employer doesn’t know if the person will work full time, the employer can measure the employee’s hours over a measurement period to find out.

• Cannot consider *duration* of employment when determining full time / variable hour status.

• But several special situations with unique rules.
Special Situations

• Student employees
  – Students who perform work through a subsidized federal work study program (or similar state program) are not “employees.”

• Seasonal employees
  – Customary annual employment is six months or less, during typically the same part of the year.
  – Can be treated as variable hour employees even though they may be expected to work 30+ hours per week.
  – Can exceed six months in unusual circumstances (ex: ski instructor works 7 months due to heavy snow season).

• Adjunct Faculty
  – Hours can be hard to track; often paid on a per course / class basis.
  – Special rule: credit 2.25 hours for each hour of classroom time (1 hour of classroom time + 1.25 hours for prep).
  – Can use the special rule or any “reasonable method” for crediting hours of service.
Special Situations

• Volunteer employees
  – “Bona fide” volunteers do not accumulate “hours of service” if their only compensation is reimbursement of expenses, payment of reasonable benefits or nominal fees customarily paid by similar entities.

• Members of religious orders
  – Any active member of a religious order subject to a vow of poverty is not an employee.

• On-Call hours
  – Must use a “reasonable method” for crediting on-call hours.
  – Unreasonable: no credit for paid on-call hours on employer’s premises or for paid on-call hours off site with substantial restrictions.
Hours of Service

• What’s an hour? How do I know when an employee averages 30+?

  – ACA refers to “hours of service.”

  – **Pay for work**: each hour for which an employee is paid or entitled to payment for the performance of duties for the employer.

  – **Pay for PTO**: each hour for which an employee is paid or entitled to payment for a period of time during which no duties are performed due to vacation, holiday, illness, incapacity, layoff, jury duty, military duty, or leave of absence. Does not include hours after termination, workers compensation, disability pay if the employee paid the premiums with post-tax dollars.

  – **Special unpaid leave** – FMLA leave, USERRA, jury duty
    - Exclude from measurement period, or
    - Credit average hours worked before leave.
Hours of Service

• What if it’s hard to track hours?
  – **Counting actual hours worked**
    - Tracking each hour the employee is performing services and entitled to payment.
  – **Days worked equivalency**
    - Credit the employee with 8 hours of service for each day in which the employee is entitled to payment for hours worked.
  – **Weeks worked equivalency**
    - Credit the employee for 40 hours of service per week for each week for which the employee is entitled to payment for hours worked.

• Can’t use an equivalency if it would substantially understate the employee’s hours of service.
School-Specific Rules

• Employment break period
  – Period of 4 consecutive weeks during which an employee of an educational organization is not credited with hours of service.
    - Intended to encompass summer break, but could also apply to sabbaticals or extended winter break
  – Employer’s choice: credit up to 501 hours of service for break periods or reduce measurement period by length of break period.

• Restart the clock
  – If an employee does not have an hour of service for 26 consecutive weeks the employer can treat them as new hires when they resume service. (13 weeks for non-educational organizations)
Look-Back Method

**Measurement Period**
- Used to determine which variable hour employees are full time (who should get an offer of coverage).
- 2 Types:
  - Initial (measuring from date of hire)
  - Standard (measuring in sync with stability period)
- Length determined by employer – 3 to 12 months.

**Administrative Period**
- Used to calculate hours and conduct open enrollment
- 90 day limit
- Between measurement and stability periods.

**Stability Period**
- Coverage must remain in place if elected.
- 2 Types:
  - Initial
  - Standard
- Same length as measurement period (if 6 months or more).
- Employees’ status as full time is “locked” during stability period (even if hours dip).
8/1 Plan year
12 month look back and stability periods
**Initial Measurement Period**

1/1 Plan Year  
12 month look back and stability periods  
30 day administrative period  
7/1 new hire date

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- **New Hire Measurement Period (7/1/16 – 6/30/17)**
- **New Hire Stability Period (8/1/17 – 7/31/18)**
- **Transitional Measurement Period (12/1/16 – 11/30/17)**
- **Transitional Stability Period (8/1/18 – 12/31/18)**
- **Standard Measurement Period (12/1/17 – 11/30/18)**
Compliance Strategies
Strategy #1: Make “Retirees” Wait

- If an employee “retires,” consider implementing a 26 week waiting period to return to work on a part-time basis
  - Common in K-12 for a teacher to “retire” and substitute teach.
  - Maybe not be as prevalent in higher education, but faculty retiring and returning to work part time presents the same issue.
  - Problem: if there’s not a 26 week period with no hours of service preformed, employer would be required to credit prior hours of service.
  - Could result in an employee “retiring” then working as a “full-time” employee for the rest of the stability period.

- Ensure “returning” part-time employees are variable hour
  - If a 26 week waiting period is implemented, returning employees are treated as new hires.
  - If employees returning on a part-time basis are classified as variable hour after a 26 week waiting period, there is no residual benefit obligation from prior employment.
Strategy #2: Counting Hours

- **It’s the least bad option** for employer mandate purposes.
  - Equivalencies are not very helpful for employers.
  - Time-keeping doesn’t have to be elaborate.
    - Consider: time-clocks, time-sheets / cards, key fob time stamps
    - Employee-reported time or employee-verified time is best practice.
Strategy #2: Counting Hours

- Exempt / Non-Exempt Faculty
  - Exempt faculty: making $23,660 / year (since the newly announced overtime rule has been withdrawn)
    - Not a big concern, since they are exempt from minimum wage and overtime requirements and likely treated as full time anyway.
  - Non-Exempt faculty: working a partial schedule or class load.
    - Likely still paid on a salary, but still due overtime if they work over 40 hours in any one week.
    - Need to track hours if the faculty member does other work for the school (taking tickets at a sporting event, assisting with symposia or events or new student orientation).
    - How do you add those “extra” hours to the core hours to determine if 40+ worked in a week?
Strategy #2: Counting Hours

• Coaches
  – Non-faculty coaches: classify as variable hour.
    - Seasonal employees – sport seasons typically 6 months or less.
    - Two sport coaches are likely still classified as variable hour since their schedules will fluctuate wildly between season and off-season.
  – FT coaches: if the coach has full time teaching responsibilities, no need to track hours for coaching if the school intends to maintain coverage.
  – PT coaches: classify as variable hour and count hours.
Strategy #3: Human Resources

• Audit and reclassify employees
  – Employer mandate obligations extend only to full time employees.
  – Is your workforce appropriately structured? Or can you reclassify / reassign employees to part-time or seasonal positions? Or rely on independent contractors?

• Revisit employee handbook policies
  – Typically contain exempt / nonexempt definitions, time-keeping procedures, definition of a workweek, consequences for failing to accurately record time, etc.

• Hours management
  – Strategically scheduling employees to ensure that “part time” employees remain under 30 hours per week.
  – Relying heavily on measurement / administrative / stability periods and payroll software to correctly manage hours.

• But be careful . . . Marin v. Dave & Buster’s, (1:15-cv-03608) (S.D. N.Y. May 8, 2015)
Strategy #3: Human Resources

• Examine total compensation
  – How does your pay compare to your peers?
  – How about your benefits?
  – Total compensation looks at both and helps you identify the message to communicate to your employees.

• Employee Communication
  – Knowing what sets you apart helps attract and retain talent.
  – Do employees know what they’re getting? Or how to take advantage of their benefits?
Strategy #4: Contribution Structure

- Employer mandate requires an offer of affordable coverage, but only 1 plan must be affordable for employee-only coverage
  - Layering plans (all employees eligible for all plans) gives flexibility.
  - Lower (or no) employer contribution for spousal or dependent coverage.
    - Spousal surcharge / exclusion

- Deductible PPO
  - $1,000
  - $2,500
- High Deductible Plan with HSA
  - $250 / month
  - $150 / month
  - No employee cost
Strategy #4: Contribution Structure

- Wage banded rates - setting contributions based on income so that higher paid employees contribute more for coverage.
  – If you make more you pay more.

- Affordability is measured on an employee by employee basis.
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