

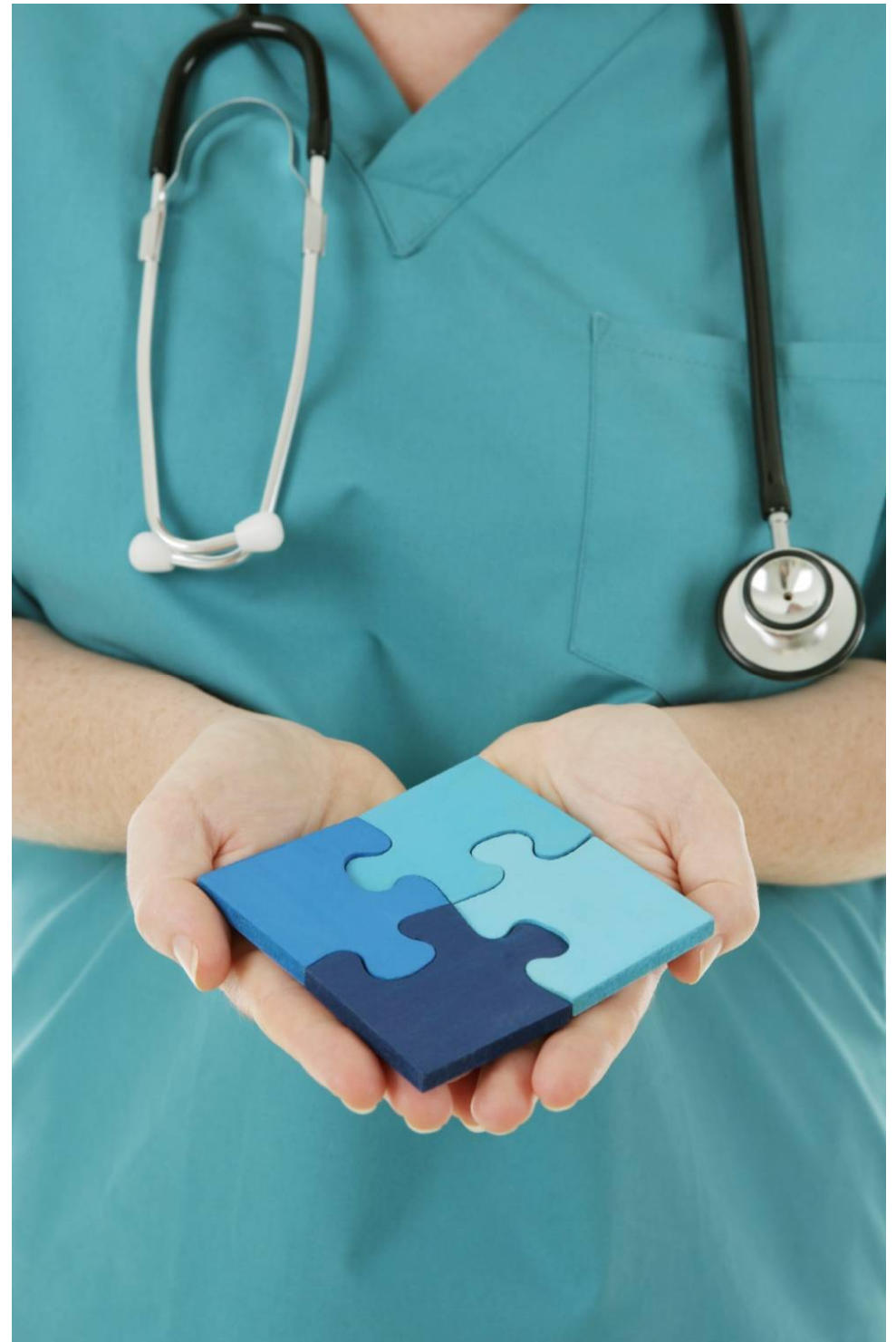


Affordable Care Act Update and Issues for Health Care Employers¹

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¹These materials are for educational purposes only and should not be construed as legal or tax advice or a legal or tax opinion relative to any specific situation.



Introduction

1. ACA Update – Current and Future Issues.
2. Selected ACA Issues and Considerations
(and Pitfalls to Avoid).
3. Q&A.

PART 1: ACA UPDATE – CURRENT AND FUTURE ISSUES

IRS Form 1094/1095 Reporting

- First round of reporting in 2016 for ALEs in 2015.
- Employers should be working with benefits and payroll providers to handle reporting.
- Be aware of safe harbors for “Qualifying Offers” and Transition Relief.” Form 1094 is signed under penalties of perjury.

IRS Form 1094/1095 Reporting

- Recent IRS Delay gives more time. (Notice 2016-4)
 - EE copies due March 31, 2016 (instead of Feb 1).
 - IRS copies due:
 - May 31, 2016 (non-electronic filers)
 - June 30, 2016 (electronic filers)
- Employees can file tax returns and just keep Form 1095 as backup. No amended return required.

Cadillac Tax Update

- Changes in 2016 Appropriations Act.
 - 2 year delay (until January 2020).
 - Tax is now deductible.
- Proposed changes in President's budget to address regional differences in cost of coverage.

Elimination of Auto-enrollment Requirement

- Bipartisan Budget Act of 2015 eliminated requirement.
- Previously large-employers (200+ EEs) would have been required to auto-enroll all EEs in employer's health plan with opt out and notice.

PART 2: SELECTED ISSUES AND CONSIDERATIONS (AND PITFALLS TO AVOID)

1. Employer Payment Plans and Premium Reimbursement Arrangements.
2. Who is the “Employer” and Who is the “Employee”?
3. Interaction of COBRA and the ACA; Coverage Affordability Issues.
4. Hours of Service; Breaks in Service; Special Unpaid Leave; “On Call” Hours.
5. Recordkeeping.

The Problem

- Tax code (IRC § 106) allows exclusion from income for ER provided health insurance.
- In the past, IRS allowed exclusion if ER paid/reimbursed EE premiums for individual health insurance policies.
- Employees may qualify for subsidized individual insurance in the Marketplace.

The Guidance (IRS Notice 2013-54; DOL FAQs)

- IRS/DOL now consider arrangements for to ER pay/reimburse EE premiums for individual insurance to be group health plans subject to ACA.
- IRS/DOL consider nature of such arrangements to violate ACA market reform requirements re preventive care and lifetime/annual limits.
- Penalties of up to \$100 per day (\$36,500 per year) per employee!
- IRS is aware of promoters claiming to have created “IRC Section 105” reimbursement plans to get around these rules.
Beware!

IRS Notice 2015-17

- Penalties will apply after July 1, 2015.
- Solution: Employer may increase EE taxable wages and not require purchase of individual health insurance.
- Guidance for 2% S corporation shareholders coming—no penalties until then.
- Guidance re Medicare/TRICARE premium reimbursement arrangements.

Who is the “Employer” and Who is the “Employee”?

Two key threshold questions:

- Who is the Employer?
- Who is an Employee?

Who is the Employer?

- **Controlled Group Rules:**
 - Parent-Subsidiary.
 - Brother-Sister.
 - Combined.
- **Focus on a high degree of common ownership.**

Who is the Employer?

Parent-Subsidiary.



Who is the Employer?

Brother-Sister

	<u>Organizations</u>						
<u>Individuals</u>	L	GHI	M	W	X	Y	Z
A	100%	50%	100%	60%	40%	20%	60%
B	0	40%	0	15%	40%	50%	30%
C	0	0	0	0	10%	10%	10%
D	0	0	0	25%	0	20%	0
E	0	10%	0	0	10%	0	0

Who is the Employer?

Affiliated Service Groups

- Focus on a combination of common ownership and the nature and extent of services performed by one organization on behalf of, or for the benefit of, another organization or its clients.
- Common issue for professional service providers, including medical practices.
- Highly technical rules.

Who is the Employer?

Affiliated Service Groups

- **Example 1:** Physician N is incorporated, and the corporation is a partner in a medical practice. Physician N and his corporation are regularly associated with the medical practice in performing services for third persons. The medical practice and the corporation form an affiliated service group.

Who is the Employer?

Affiliated Service Groups

- **Example 2:** Partnership R is a dental practice that has 11 partners. Each partner of R owns five percent (5%) of the stock in Corporation D, a dental lab. The corporation provides services to the partnership of a type historically performed by employees in the dental practice and a significant portion of the business of the dental lab consists of providing services to the dental practice. The partnership and the dental lab form an affiliated service group.

Who is the Employer?

- Highly technical.
- Ownership attribution, anti-abuse and employee leasing rules.
- Obtain legal advice if questions arise.

Worker Classification: Who is the Employee?

- Significant risks for all sizes of employers under the ACA.
- ACA looks to “common law” rules. IRS 20 factor test under Rev. Rul. 87-41.
- Risks and Examples.

Worker Classification: Who is the Employee?

Example 1 – Scenario:

- Employer X does not offer health insurance coverage because it believes it employs only 45 FTE employees.
- An IRS audit indicates Employer X misclassified eight (8) of its full-time workers as independent contractors.

Worker Classification: Who is the Employee?

Example 1 – Result:

- Employer X is actually an ALE subject to the ACA's penalty and reporting regime.
- Employer X faces ACA penalties of \$46,000 per year for failing to offer coverage to its full-time employees and additional penalties for failing to file the required information returns.
- IRC §4980H(a) Penalty = $\$2,000 \times (53-30) = \$46,000$.

Worker Classification: Who is the Employee?

Example 2 – Scenario:

- Employer Y is an ALE that provides affordable, minimum value coverage to 190 of its 200 full-time employees.
- Employer Y also utilizes a group of 20 independent contractors that the IRS later reclassifies as employees.

Worker Classification: Who is the Employee?

Example 2 – Result:

- Employer Y faces penalties of \$380,000 per year because coverage has been offered to less than 95 percent of full-time employees ($190/220 = 86\%$).
- IRC §4980H(a) Penalty = $\$2,000 \times (220-30) = \$380,000$.

Worker Classification: Who is the Employee?

Example 3 – Scenario:

- Employer Z is an ALE that provides affordable, minimum value coverage to all 200 of its full-time employees.
- Employer Z also has of 10 independent contractors the IRS reclassifies as employees, 4 of whom obtained subsidized coverage through the federal Marketplace.

Worker Classification: Who is the Employee?

Example 3 – Result:

- Employer Z could be subject to ACA penalties of \$12,000 per year because it failed to offer these workers the opportunity to enroll in its health plan.
- IRC §4980H(b) Penalty = \$3,000 x 4 = \$12,000.

Worker Classification: Who is the Employee?

- Recommend conducting internal audit of workforce and worker classification practices.
- Obtain legal advice where necessary.

Interaction of COBRA and the ACA; Coverage Affordability Issues

- Termination of Employment.
 - COBRA Coverage; No Further ACA Issues.
- Reduction in Hours; Leave of Absence; No Termination of Employment.
 - COBRA event.
 - ACA still requires coverage during stability period.
 - COBRA Offer = ACA Offer; No IRC Section 4980H(a) Penalty.
 - IRC Section 4980H(b) Penalty May apply if COBRA is “unaffordable.”
- Affordability.
 - Unaffordable if self-only cost exceeds 9.66% of household income.
 - Avoid IRC Section 4980H(b) Penalty by subsidizing COBRA coverage.

Hours of Service; Breaks in Service; Special Unpaid Leave; “On Call” Hours

- Hours of Service.
 - Paid Hours, including paid leave (disability leave).
- Breaks in Service.
 - Employee returning after unpaid absence—new or continuing EE?
 - If Continuing EE: Must provide coverage on first day or as soon as practicable.
 - If New EE: EE may be subject to health plan waiting period.

Breaks in Service

- Break of 13+ Weeks.
 - Treated as new EE.
- Rule of Parity.
 - May treat as new EE if period in which no hours of service:
 - At least 4 weeks long (but less than 13); and
 - Exceeds the number of weeks of employment preceding break period.

Example: Employed for 5 weeks and then 6 week unpaid break in service.

Special Unpaid Leave

- Special Unpaid Leave: FMLA, USERRA, jury duty.
- ER can either:
 - Calculate the EE's average hours of service during the measurement period by excluding special unpaid leave; or
 - Impute hours of service during the periods of special unpaid leave at a rate equal to the average weekly hours of service for weeks that are not part of special unpaid leave.

“On Call” Hours

- Regs don't address how to count “on call” hours.
- Until formal IRS guidance is issued, ERs must use “reasonable” method to credit on call hours.
- Recommend reviewing practices for crediting “on call” hours.

“On Call” Hours

- Not “reasonable” if it counts only portion of hours in position that is normally full time.
- Not “reasonable” to fail to credit for any on call hour:
 - For which payment is made;
 - For which EE must remain on ER’s premises; or
 - For which EE activities subject to “substantial restrictions” that prevent EE from effectively using own time.
- Partial-hour credit not “reasonable.”

Recordkeeping

- ACA compliance likely a target of future IRS and DOL audits.
- Employers must substantiate ACA positions taken.
- Keep records necessary to substantiate:
 - The categorization of employees (full-time, part-time, seasonal, variable hour) and workers considered independent contractors;
 - The applicable measurement periods, stability periods and administrative periods;
 - Offers of Coverage;
 - The hours of service for each employee; and
 - All other items required to be reported IRS Form 1094/1095.

Q&A and Contact Information



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