



Compliance Update 2015

Disclaimer

This presentation is intended to convey general information and is not an exhaustive analysis. This information is subject to change as guidance develops.

My Benefit Advisor does not provide legal or tax advice. For advice specific to your or your client's situation, please consult an attorney or other professional.

Agenda

- Overview
- ACA Updates
 - Legislative action
 - *King v. Burwell*
 - Plan design reminders and updates
 - Fees and taxes
 - Employer mandate and reporting
- Non-ACA Updates
 - Wellness programs
 - Anthem breach
 - Same-sex marriage

Overview

- New control of Congress and legal challenges will impact employers in 2015
- New compliance requirements and ongoing obligations will add to the burden
- Upcoming 2016 elections may further change the landscape

A photograph of two men in business suits sitting at a table, looking at a tablet. The image is overlaid with a semi-transparent blue filter. The man on the right is pointing at the tablet screen. There are papers and a pen on the table in the foreground.

ACA UPDATES

Preparing for 2015-2018

Legislative Action

Congress has already taken action to chip away at the ACA

40 hours vs. 30 hours

- House voted to change the definition of FTE to 40 hours of service/week
- Senate introduced similar legislation and a vote is expected later
- President said he would veto

Other legislative initiatives

- Repeal medical device tax
- Allow small businesses to fund HRAs for the purchase of individual insurance – *recent guidance addresses this issue with limited relief*

King v. Burwell

Issue: Whether the IRS may permissibly promulgate regulations to extend tax-credit subsidies to coverage purchased through Marketplaces established by the federal government under Section 1321 of the ACA

- **IF YES** – status quo
- **IF NO** – subsidies would not be available to certain individuals in the 37 federal Marketplaces
 - Individual mandate: will individuals buy coverage without subsidies? Impact of adverse selection.
 - Employer mandate: no subsidies = no 4980H liability

Reminders

Grandfathered Plan

- Always measure status based on coverage in effect on March 23, 2010
- Provide notice in plan materials (model notice available)
- Maintain records that verify, explain or clarify GF status – records must be made available upon request
- If insured, ensure carriers actually allow a GF plan

Reminders

Plan Design Changes

- California waiting periods match ACA 90 days (60 days repealed as of 1/1/15)
- Health FSA limit increases to \$2,550 for 2015
- For 2015, max OOP for non-GF plans \$6,600 self-only/\$13,200 family (QHDHP regardless of GF status have lower max OOPs for 2015, \$6,450 self-only/\$12,900 family)
- Non-GF preventive care: tobacco use/counseling is met if plan covers at 100%
 1. Screening for tobacco use, and
 2. For those that use tobacco products at least 2 cessation attempts a year: (a) four 10-minute counseling sessions; and (b) all FDA approved tobacco cessation medications without authorization/with prescription

FAQs Address Supplemental Benefits

Supplemental benefits – excepted benefit

EXCEPTED BENEFITS ARE EXEMPT FROM ACA MARKET REFORMS

- Certain supplemental benefits are excepted when:
 - Issued under a separate policy, certificate or contract of insurance by an entity that does not provide the primary coverage under the plan
 - Specifically designed to fill gaps in primary coverage, such as coinsurance or deductibles
 - The cost of the supplemental coverage may not exceed 15% of the cost of primary coverage; and
 - The supplemental coverage sold in the group market does not differentiate among individuals in eligibility, benefits, or premiums based upon any health factor

FAQs Address Supplemental Benefits

FAQ XXIII

- Intended proposed rule.

*A policy will be designed to “fill in the gaps” of the primary coverage only if the benefits covered by the supplemental insurance product **are not an essential health benefit (EHB)** in the state where it is being marketed.*

- Supplemental policies that provide coverage for Rx, hospitalization or any other EHB may not be excepted benefits and subject to ACA mandates – unless another exception applies

Individual Premium Reimbursement

General Rule

- Any employer that offers an *employer payment plan* offers a group health plan that fails to comply with the market reforms under the ACA and is subject to an excise tax of \$100/day/individual affected (\$36,500/individual/year)
- *Employer payment plan* refers to arrangement where employer reimburses for some or all of the premium costs incurred for individual health insurance coverage (or pays for such coverage directly) – pre-tax or post-tax
 - An increase in an employee's compensation that is not conditioned on the purchase of individual health insurance coverage is NOT an employer payment plan and does not violate the ACA

Limited Transition Relief

- Provides a narrow window where a small employer (fewer than 50 FTEs) may operate an *employer payment plan* and not be subject to the excise tax
- **A small employer will not be subject to the excise tax until July 1, 2015** for any *employer payment plan* that pays or reimburses employees for individual health plan premiums

Taxes and Fees

PCORI

- Next PCORI payment due **July 31, 2015**
- Employers with **self-insured plans** (including HRAs) must pay the fee using Form 720 (carriers responsible for insured plans)
- Payment is \$2.08/covered life/year for Nov. and Dec. 2013 plan years and Jan. 2014 plan years (3rd payment)
- Payment is \$2.00/covered life/year for all other 2014 plan years (2nd payment)

Taxes and Fees

Reinsurance

- 2014 reinsurance fee \$63/covered life/year -- payment due by Jan. 15, 2015 (and Nov. 15, 2015 if paying in two installments)
- 2015 reinsurance fee is \$44/covered life/year – **counts due to HHS by Nov. 15, 2015** with payment due by Jan. 15, 2015 (and Nov. 15, 2016 if paying in two installments)
- 2016 fee is \$27/covered life/year
- Employers with self-insured plans are responsible for the fee (carriers responsible for insured plans)

Taxes and Fees

Health Insurer Fee

- Applies to insured medical, dental and vision coverage
- Does not apply to single employer self-insured health plans
- Currently does not apply to stop-loss insurance
- Fee is based on market share – estimate 2-3% of total costs, first year
- Amount of fees will increase each year and is ongoing

Taxes and Fees



Cadillac Tax

- Beginning 1/1/18, a 40% excise tax applies to the applicable cost of employer-sponsored coverage provided to an employee above certain statutory limits (\$10,200 self-only/\$27,500 coverage other than self-only for 2018)
- Notice 2015-16 describes potential approaches to the “Cadillac Tax” (4980I) that may be incorporated in future regulations
 - Definition of applicable coverage
 - Determination of cost of applicable coverage (may impact COBRA premium calculation)
 - Application of the annual statutory dollar limit to the cost of applicable coverage

Highlights

- Employer contributions (including pre-tax contributions to a health FSA, HSA or HRA) are applicable coverage
- On-site medical clinics that provide more than just first aid and executive physical programs are considered applicable coverage
- Consider expanding the exclusion for minimal levels of treatment beyond first aid
- Employee after-tax HSA contributions are not included in an applicable coverage determination
- Dental and vision are exempt if insured, and comments are sought whether to exempt self-insured dental/vision
- Comments by 5/15/15

Employer Mandate

- Beginning 1/1/15, applicable large employers may face penalties if any full-time employee receives a subsidy to purchase insurance in the Marketplace
- Large Employer
 - For 2015, employers with 100 or more FTEs (one-year delay for employers with fewer than 100 FTEs, subject to certain rules)
 - For 2016, employers with 50 or more FTEs
 - All employees of a controlled group are counted to determine large employer status
 - Includes full-time equivalents to determine large employer status

Employer Mandate

- Full-time employee
 - At least 30 hours of service/week (or 130 hours of service/month)
 - Determined using a measurement method (look-back or monthly)
- 2 possible penalties
 - Applicable penalty will depend on particular circumstances of large employer
 - To trigger penalty, the FTE must actually receive subsidized coverage in the Marketplace

Employer Mandate

“No Coverage” Penalty

- Applies if the large employer does not offer at least 95% of FTEs and their children group health plan coverage and at least one FTE receives a subsidy
- \$166.67/month (\$2,000/year) X # FTEs – 30
- For 2015 only 70%/80 replace 95%/30
 - Does not apply if a non-CY plan changed plan year after 2/9/14 to begin at a later date

“Offer Coverage” Penalty

- Applies if the large employer offers coverage to at least 95% of FTEs and their children but the coverage is not minimum value, affordable, or the FTE is one of the excluded 5% and receives a subsidy
- Lesser of \$250/month (\$3,000/year) X each subsidized FTE or “No Coverage” penalty
- For 2015 only, 70%/30% replace 95%/5%

Employer Mandate

If coverage is offered, it must be of a minimum value and affordable to avoid penalty exposure

Minimum Value

- A plan that covers at least 60% of total allowed cost of benefits incurred under the plan
- Mechanisms for determination: MV calculator, safe harbor plan designs, actuarial determination
- Plans that exclude hospitalization or physician services cannot satisfy MV

Affordable

- Cost for self-only coverage does not exceed 9.5% of household income
- Three safe harbors are available when MV is offered: Rate of Pay, W-2, and FPL (\$93.18 announced for 2015)
- No required contribution for children or spouses

Marketplace Subsidy Notices

- Under the ACA, Marketplaces must provide notices to employers regarding any employee who purchases subsidized coverage
- Notices have been issued for 2014 and are causing confusion
- References a penalty assessment, which is not applicable for CY 2014; it may be applicable in 2015
- Appeals process should be outlined in the notice; employers may consider whether to appeal the Marketplace notice
- Actionable notices regarding penalty assessment will come from the IRS (in 2016 for CY 2015)

6055/6056 Reporting

- Beginning with CY 2015, applicable large employers must use Forms 1094-C and 1095-C to report the information required under Code sections 6055 and 6056 about offers of health coverage and enrollment in health coverage for their employees
- Forms are used by the IRS to determine whether:
 - A large employer owes a penalty payment under the employer mandate (6056);
 - An employee is eligible for subsidies to purchase coverage in the Marketplace (6056); and
 - An individual has minimum essential coverage in order to avoid a penalty tax under the individual mandate (6055)

6055/6056 Reporting – Employer Requirements

Large employers must complete, distribute and file these forms beginning in early 2016 for CY 2015. This is an annual requirement.

What to complete?		
Large employer with an insured health plan	<p>6056 Reporting: All parts of Form 1094-C Parts I and II of Form 1095-C</p> <p>Employer is responsible for large employer reporting (6056) – carrier is responsible for 6055 (MEC) reporting and will issue Form 1095-B</p>	<p>A Form 1095-C must be furnished to each FTE by 2/1/16 for CY 2015</p> <p>Form 1094-C and all Forms 1095-Cs must be furnished to the IRS by 2/29/16 (unless filing electronically, then 3/31/16)</p>
Large employer with a self-insured health plan	<p>6055 & 6056 Reporting: All Parts of Form 1094-C All Parts of Form 1095-C</p> <p>Employer is responsible for both MEC reporting (6055) and large employer reporting (6056)</p>	<p>A Form 1095-C must be furnished to each FTE and each covered employee/individual by 2/1/16</p> <p>Form 1094-C and all Forms 1095-Cs must be furnished to the IRS by 2/29/16 (unless filing electronically, then 3/31/16)</p>

Information to Collect

- Basic Information (1094-C and 1095-C)
 - Name, EIN, address, contact person, contact person phone number
 - If part of a controlled group, name and EIN of other employer members
 - If health plan coverage is offered, funding status during the calendar year (insured or self-insured)
 - Calendar year reporting (e.g., 2015)
 - Name, address, tax identification number of all full-time employees
- Employer Information Reported on a Monthly Basis (1094-C)
 - Was an offer of MEC made to at least 95% of FTEs and children to age 26 for each month of CY?
 - Total number of FTEs for each month of CY
 - Total number of all employees (FTEs and non-full-time) for each month of CY
 - 2015 transition relief eligibility: medium sized employer relief or 70%/80 relief
- Full-Time Employee Information Reporting on a Monthly Basis
 - The health plan coverage, if any, offered to the FTE (and any family members) each month of the CY
 - The self-only premium an employee must pay for the lowest-cost plan that provides minimum value
 - The reason why an employer would not be subject to a penalty for a particular month (e.g., employee in waiting period, employee in IMP)
 - The months for which the employer relied on non-CY relief with respect to the full-time employees
- If Self-insured, Covered Employee Information Reported on a Monthly Basis
 - Names, SSN and months of coverage for any employee/non-employee (e.g., retiree, COBRA QB) (and their family members) covered by the self-insured health plan during the CY

**Subject to change as guidance develops

6055/6056 Reporting

Are small employers responsible for any reporting obligations?

No – unless self-insured, then responsible for 6055 reporting

What to complete?		
Small employer with an insured health plan	<p>Employer has no responsibility</p> <p>Carrier will issue Forms 1095-B to any covered employee/individual to report MEC</p>	N/A – Carrier obligation (timeframes for carrier reporting is same as employer reporting)
Small employer with a self-insured health plan	<p>Employer responsible for 6055 (MEC) reporting:</p> <p>All Parts except Part II of Form 1094-B All Parts of Form 1095-B</p>	<p>A Form 1095-B must be furnished to each covered employee/individual by 2/1/16</p> <p>Form 1094-B and all Forms 1095-Bs must be furnished to the IRS by 2/29/16 (unless filing electronically, then 3/31/16)</p>

Small Employers -- 2016

- Expanded federal “small employer” definition
 - Applies inside and outside Marketplace
 - Currently defined as employers with fewer than 50 full-time equivalent employees
 - Beginning 1/1/16 changes to employers with 100 or fewer full-time equivalent employees

*Insured arrangements

*Absent relief, community rating rules will apply – age banded rates

* EHBs for non-GF plans

Other ACA-Related Items

- Creditable Coverage Certs
 - No longer required after 12/31/14
- Pre-ex Notice
 - No longer required, as no pre-ex is permitted PYs on or after 12/31/13
- Notice of Coverage Options
 - Continue to provide to all new hires
- W-2 Reporting
 - Employers that filed at least 250 forms W-2 for 2014 are subject to reporting for CY 2015 (W-2 issued Jan. 2016)
- SBC
 - Proposed rule to revise SBC
 - Including 4 pages front & back to 2 ½ pages front & back
 - Tentatively effective for SBCs issued on or after 9/1/15

A photograph of two men in business suits sitting at a table, looking at a tablet. The image is overlaid with a dark blue tint. The man on the right is pointing at the tablet screen. There are papers and a pen on the table.

NON-ACA UPDATES

Wellness programs, Anthem Breach, Same-sex marriage

Status of Incentive Based Wellness Programs

- HIPAA Rules
 - Prescribe relatively clear path for designing incentive based programs tied to premium differentials in group health plan (5 factor test)
 - Compliance with HIPAA ≠ compliance with any other law
- ADA/GINA
 - Problems exist under ADA and GINA around financial rewards tied to completion of health assessments, biometrics and/or physician engagement (including spouse participation)
- Enforcement action
 - EEOC (enforces ADA and GINA) initiated three lawsuits challenging incentive based wellness programs
- Legislative action
 - White House and Congress have expressed “concern” about EEOC action, particularly given lack of any guidance
- Regulatory guidance
 - Jan. 2015 Sen. Murray indicated EEOC regulations on wellness programs were coming soon – nothing yet!

Legal Challenges

- ADA: EEOC initiated legal action against 3 employers alleging their wellness programs violate the ADA
 - ADA prohibits employers from requiring medical examinations or making disability-related inquiries unless job related and consistent with business necessity
 - Exception for “bona fide” plans and voluntary wellness programs – undefined
- GINA: EEOC alleges a GINA violation against *Honeywell* as a surcharge applies to an employee if a spouse did not complete biometrics
 - GINA prohibits employers from requesting or requiring genetic information from an employee unless voluntary (no penalty or reward)
 - Genetic information includes the manifestation of disease or disorder in an employee’s family members – defined to include a spouse and/or adopted children (common genetic information?)

Legal Challenges

- *Honeywell*
 - Up to \$4,000 surcharge for non-compliance
- *Flambeau*
 - Coverage canceled and required employee to pay 100% of cost
- *Orion Energy*
 - Required employee to pay 100% of cost for non-participation and surcharge for not using Range of Motion Machine
 - Employee subsequently fired

* To date, these cases have not gone to trial and no court has ruled on these specific issues

What to Consider

Do

- Ensure any reward threshold complies with HIPAA requirements
- Understand potential risks of incentive based strategies in light of the ADA, GINA and recent litigation
- Use language like *reward*, as opposed to *penalty* or *surcharge* when describing/communicating the program
- Await further guidance – indications are that EEOC should issue something this year

Don't

- Fire employees for non-participation
- Impose significant cost-sharing (e.g., 100% of the premium) for non-compliance
- Deny access to coverage or access to a specific benefit (e.g., HRA)

Anthem Breach

- January 29, 2015 attack
- Anthem believes suspicious activity began early December 2014
- Impacts current or former members of Anthem's affiliated health plans
 - Anthem is a service provider to other group health plans and BlueCross and Blue Shield plans across the country (see FAQs for list)
- Information accessed includes names, DOB, SSN, health care ID numbers, addresses, emails, employment information (incl. income data)
- They do not believe credit card, banking or medical information (e.g., claims, test results) were accessed

Anthem – What’s Being Done?

- Investigation ongoing
- AllClear Identity Protection for 2 years at no cost
- Individual notification to current and former members by mail
- www.AnthemFacts.com
- Toll Free Hotline 877-263-7995
- FAQ <https://www.anthemfacts.com/faq>

Anthem – Employer Action

Self-Insured Plans

- Anthem is acting as the BA in their role as TPA to the group health plan (covered entity or “CE”)
- Should be a BAA between Anthem and the CE which will likely lay out responsibilities in event of breach
- Generally, BA must notify CE and CE has the responsibility for breach notices
- However, contractually, the CE can require the BA to send out the required notification in even of a BA’s breach
- Review BAA

Insured Plans

- Anthem, as the carrier, is the CE and likely responsible for any breach notification to affected individuals, HHS and the media

Same-Sex Marriage

Status

- Same-sex marriage currently legal in 37 states and DC. Further developments expected.
- Under *Windsor*, federal law will recognize any marriage (including same-sex marriage) regardless of where couple lives
- Supreme Court will decide whether a state law barring same-sex marriage violates the equal protection clause of the 14th amendment

Impact to Health and Welfare Plans

- Any legally married spouse (regardless of sex) is a spouse under federal law
- Implications for self-insured plans (mandate to cover same-sex spouse?)
- Federal tax free benefits, pre-tax contributions, FSA/HSA/HRA expense eligibility (state law may differ)
- Does not extend to domestic partners, civil unions or other non-marriages (imputed income still applies)
- Final regulations extend FMLA rights to same-sex spouses based on “place of celebration” vs. residence effective 3/27/15

MYBENEFIT
ADVISOR



Thank You!