



Business for Breakfast:
**What Businesses Need To Do Now Under the
Affordable Care Act**

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HUSCH BLACKWELL

Topics for Discussion

The Delay

Grandfathered Status

Calculating Employer Size

“Pay or Play” Penalties

“Pay or Play” Examples

Determining Full-Time Status

Changes in the Marketplace

THE DELAY

The Delay

- On July 2, 2013, the employer mandate (“Pay or Play”) was delayed until January 1, 2015.
- What does this mean?
 - Is the delay effective?
 - What about the 2014 safe harbors?
 - 6 month transition rule
 - Coverage for dependents
 - Measurement period transition rule
 - Staffing determinations for 2014
 - Cost Sharing Cap for Rx for 2014

GRANDFATHERED STATUS

Grandfathered Status

- What is it?
 - A health plan (or insurance coverage);
 - which existed on March 23, 2010; and
 - Had at least one person enrolled on that date.
- Why does it matter?
 - Grandfathered plans are not subject to all immediate market reforms:
 - Nondiscrimination;
 - Preventive services;
 - Provider access

Grandfathered Status

- How does a health plan maintain grandfathered status?
 - Required disclosure with any plan materials describing benefits available under the plan
 - Maintain documentation as of March 23, 2010
- Who can join a grandfathered health plan?
 - Employees and family members

Grandfathered Status

- How does a health plan lose grandfathered status?
 - Elimination of all or substantially all benefits to diagnose or treat a particular condition
 - Increase in a percentage cost-sharing requirement
 - Increase in a deductible or out-of-pocket maximum by an amount that exceeds medical inflation plus 15 percentage points
 - Increase in a copayment by an amount that exceeds medical inflation plus 15 percentage points (or, if greater, \$5 plus medical inflation)
 - Decrease in an employer's contribution rate towards the cost of coverage by more than 5 percentage points
 - Imposition of annual limits on the dollar value of all benefits below specified amounts
- Other prohibited acts:
 - Force employees/individuals into a different grandfathered plan to save on costs (non-bona fide employment-based reason);
 - Force switch from non-grandfathered health plan to grandfathered health plan to save on costs (non-bona fide employment-based reason)

CALCULATING EMPLOYER SIZE

Applicable Large Employer

- An Applicable Large Employer is an employer who:
 - Employed an average of at least fifty (50) full-time employees and full-time equivalents combined;
 - on business days during the preceding calendar year.

A.L.E. – The Basics

Full-Time Employee:

A person employed, on average, at least 30 hours of service per week. (Determined on a monthly basis.)

Hours of Service:

Any hour when an employee is entitled to payment (whether or not performing services). This includes hours for sick pay, vacation pay, holiday pay, etc.

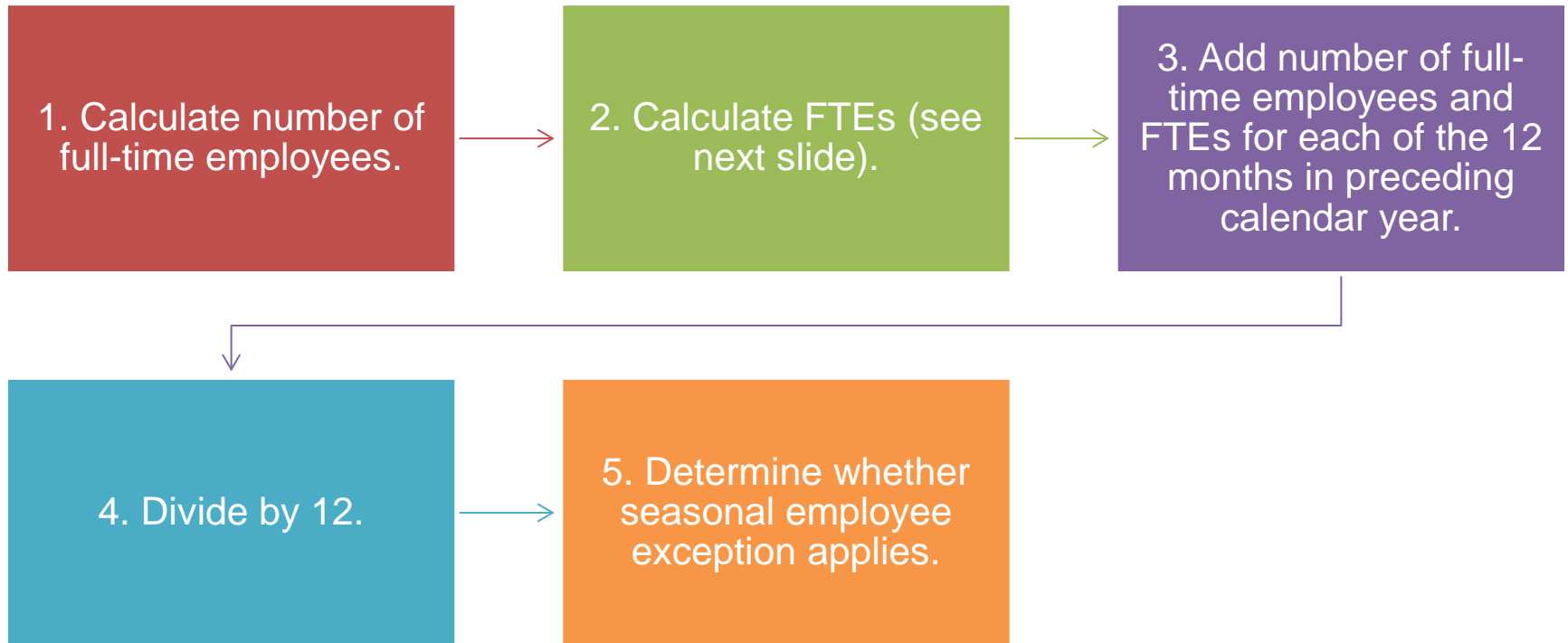
Full-Time Equivalent or (FTE):

a calculation based on the hours worked by all non full-time employees.

Determining FTEs

- Number of FTEs for a calendar month can be determined as follows:
 - Add up total “hours of service” for all non-full-time employees for the month.
 - Divide total by 120.
- This is the number of FTEs for the calendar month.

Determining if You are an A.L.E. – The Five Step Program



Exception for Seasonal Employer



- A “seasonal employer” can employ more than 50 full-time employees (for no more than 120 days during the calendar year), **IF**
 - all full-time employees in excess of 50 during such period are “seasonal workers”.
- A “seasonal worker” performs work on a seasonal basis, as defined by DOL, including holiday retail workers and certain agricultural workers.
- May use either 4 months or 120 days.
 - Need not be consecutive.

Aggregation Rules

- In determining whether an employer is an Applicable Large Employer, the current IRS rules for aggregation will be used.
- Multiple employers will be treated as a single employer if the entities are all:
 - Members of a controlled group,
 - Under common control (whether incorporated or not), or
 - Members of an affiliated service group.

Aggregation, Cont.

Controlled group of corporations generally means:

parent/subsidiary

brother/sister

combined group

Common control generally means:

parent/subsidiary group of trades or business

brother/sister groups of trades or business

combined group of trades or business under common control

“PAY OR PLAY” PENALTIES

When Does “Pay or Play” Apply?

- Must be an Applicable Large Employer;
- At least one **full-time** employee received a subsidy from the Exchange; and
- The employer either:
 - Did not offer coverage; or
 - Offered coverage that was not “affordable” or did not provide “minimum value”

Penalty Amounts

- Not offering coverage:
 - \$166.66 **PER MONTH** multiplied by the number of **ALL** full-time employees.
 - \$2,000 per full-time employee / per year
- Offering coverage (but not enough):
 - \$250.00 **PER MONTH** multiplied by the number of full-time employees **WHO RECEIVED AN EXCHANGE SUBSIDY.**
 - \$3,000 per “subsidy” full-time employee / per year

Did Not Offer Coverage

- An Applicable Large Employer will be treated as offering coverage if it offers coverage to all but 5% (or, if greater, 5) of its full-time employees (including dependents).
 - Determined on a company-by-company basis if aggregation rules apply.
- For this purpose only, “dependent” means child under 26 (not spouses).

Did Not Offer Coverage

- The number of full-time employees for the month is reduced by 30 for purposes of calculating the shared responsibility payment.

Offered Coverage, But...



- Applies when coverage offered is not affordable or does not apply minimum value.
- This is capped at the amount the employer would pay if the employer did not offer coverage (taking into account the 30 employee reduction).

Safe Harbor – “Affordability”

- W-2 Safe Harbor – 9.5% of the employee’s income shown on the W-2.
- Rate of Pay Safe Harbor – 9.5% of amount equal to 130 hours times employee’s hourly rate of pay.
- Federal Poverty Line Safe Harbor – 9.5% of federal poverty line for a single individual divided by 12.

“PAY OR PLAY” EXAMPLES

Example 1 – Not offering coverage

- Employs 30 full-time employees
- Employs 24 part-time employees (average 80 hours per month)
 - $(24 \times 80) / 120 = 16$
- 1 full-time employee receives a subsidy
- ALE: $30 + 16 = 46$ per month
- No Penalty

Example 2 – Not offering coverage

- Employs 40 full-time employees
- Employs 24 part-time employees (average 80 hours per month)
 - $(24 \times 80)/120 = 16$
- 1 full-time employee receives a subsidy
- ALE: $40 + 16 = 56$ per month
- Penalty : $\$166.66 \times (40-30) = \$1,666.60$ per month

Example 3 – Not offering coverage

- Employs 40 full-time employees
- Employs 24 part-time employees (average 80 hours per month)
 - $(24 \times 80) / 120 = 16$
- 24 part-time employees receive a subsidy
- ALE: $40 + 16 = 56$ per month
- No Penalty - No full-time employees received a subsidy

Example 4 – Not offering coverage

- Employs 30 full-time employees
- Employs 50 part-time employees (average 80 hours per month)
 - $(50 \times 80) / 120 = 33.33$
- 1 full-time employee receives a subsidy
- ALE: $30 + 33 = 63$ per month
- Penalty : $\$166.66 \times (30 - 30) = \0.00 per month

Example 5 – Offering coverage

- Offers coverage, but it is below “bronze” level
- Employs 30 full-time employees
- Employs 50 part-time employees (average 80 hours per month)
 - $(50 \times 80)/120 = 33.33$
- 10 full-time employee receives a subsidy

- ALE: $30 + 33 = 63$ per month
- Penalty: $\$250 \times 10 = \$2,500.00$ per month, **BUT**
- N/O Penalty: $\$166.66 \times (30-30) = \underline{\underline{\$0.00 \text{ per month}}}$

Example 6 – Offering coverage

- Offers coverage, but it is below “bronze” level
- Employs 60 full-time employees
- 3 full-time employee receives a subsidy
- Penalty: $\$250 \times 3 = \underline{\$750.00 \text{ per month}}$
- N/O Penalty: $\$166.66 \times (60-30) = \$4,998.80 \text{ per month}$

DETERMINING FULL-TIME STATUS

Who Is A Full-Time Employee?

Hourly Employees use:

Hours Worked

Hours worked by the employee and hours for which payment is made or due.

Non-Hourly Employees use one:

Actual hours

“Days Worked” Equivalent*

(8 hours/day for any day the employee did **any** work)

“Weeks Worked” Equivalent*

(40 hours/week for any week the employee did **any** work)

*Cannot use equivalent if it would substantially understate actual hours.

Determining Full-Time Employee Status

- Ongoing Employees: Use defined period of time (3 – 12 months) to determine full-time status (“Standard Measurement Period”).
- Once status is determined, a “stability period” applies – length of time the employer has to treat the employee as determined in the Standard Measurement Period.
- In between, the harbor allows for an “administrative period” of up to 90 days.
- Can use a waiting period of up to 90 days before offering coverage to full-time (or “reasonably expected”).

Determining Full-Time Employee Status

- New Employees (Variable Hour) – The initial measurement period and administrative periods cannot extend beyond end of 1st calendar month after anniversary date. Determination carries over into stability period. Afterwards, transition the employee to the Standard Measurement Period.
- Seasonal Employees – Similar to variable hour employees. The employer can use reasonable, good faith interpretation of “seasonal employee” definition through at least 2014.

Special Rules for Breaks in Employment



Termination/ Rehire

- 26 week rule
- 4 week rule

Unpaid Special Leave, e.g.:

- FMLA, USERRA, Jury Duty



CHANGES IN THE MARKETPLACE

Limit on Cost Sharing

- Cost sharing amounts for all health plans offered on or after 2014 must not exceed High Deductible Health Plan limits that qualify for an HSA.
 - \$6,350 individual / \$12,700 family for 2014
- Inflation factor will be used based on growth in “average per capita premium for health insurance coverage” over amount in 2013.
- Special Rule 2014 for separately administered benefits, *e.g.*, prescription benefits.

Small Group Deductibles

- For small group plans, the deductible under the plan may not exceed \$2,000 in the case of a single individual and \$4,000 in the case of family coverage.
- May be increased by the maximum amount of reimbursement reasonably available to a participant under HRAs/FSAs.
- Does not include deductible for out of network services.
- **NOTE:** Definition of small group is based on “applicable large employer” standards. Will increase to 100 or more full time employees in 2016.

Essential Health Benefits

- Non-grandfathered plans in the individual and small group markets, both inside and outside the exchanges, must cover essential health benefits beginning in 2014.
- Contraceptive services are required to be covered with no cost sharing unless an exception (or injunction) applies:
 - Does not apply to a non-profit entity that:
 - opposes providing the services on religious grounds;
 - holds itself out as a religious organization; and
 - self-certifies to that effect.

Contraceptive Coverage

- Contraceptive services are required to be covered with no cost sharing unless an exception (or injunction) applies:
- Under the final rule, does not apply to an entity that:
 - is a non-profit;
 - opposes providing the services on religious grounds;
 - holds itself out as a religious organization; and
 - self-certifies to the above.
- Numerous challenges are proceeding:
 - *Hobby Lobby, Little Sisters of the Poor, East Texas Baptist University, Wheaton College, Ave Maria, EWTN, Belmont Abbey College, Colorado Christian University, Guidestone*

Risk Pools

- Individual Market – all non-grandfathered health plans offered in the individual market are considered a single risk pool.
- Small Group Market – all non-grandfathered health plans offered in the small group market are considered a single risk pool
- A state law requiring grandfathered health plans to be included in the same risk pool as non-GF plans will not apply.

Premiums - Rating

- Rate in the individual and small group market for coverage may vary by only the following:
 - Individual or family;
 - Rating area;
 - Age (may not vary by more than 3:1 for adults); and
 - Tobacco use (up to 1.5:1)
- If the state permits health issuers to offer coverage in the large group market in the exchange, the rating provisions above would apply to all large group market coverage.

Discrimination

- Non-grandfathered, fully-insured groups cannot discriminate in favor of highly compensated individuals.
- Unlike existing rules for self-funded groups, violations could result in:
 - \$100 per affected individual per day excise tax (Tax Code);
 - Up to \$100 per affected individual per day civil penalty (Public Health Service Act); and
 - Civil actions for injunction and equitable relief (ERISA).
- Delayed until the administration issues rules.

Discrimination

- Employers may not retaliate against an employee for:
 - reporting violations of ACA; or
 - receiving a tax credit or a cost sharing reduction in an exchange.
- ERISA Section 510 (29 U.S.C. § 1140)
 - “It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan...”

Contact Information



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