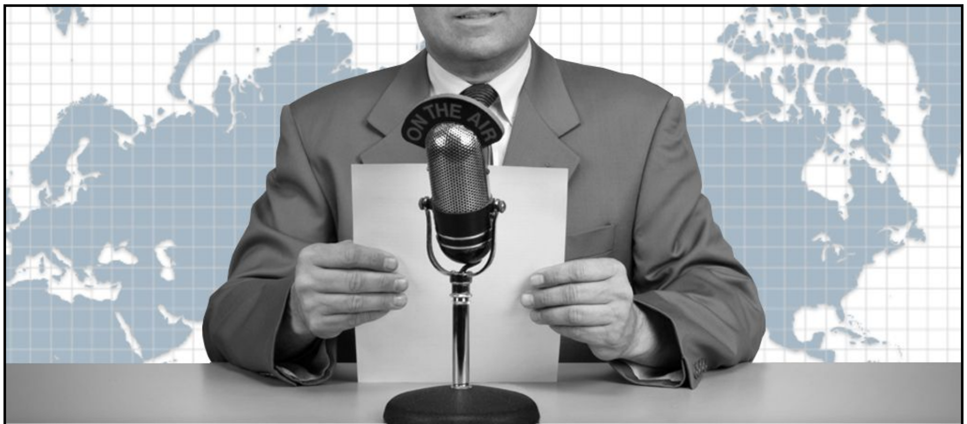

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Thursday, May 8, 2014

12:00 p.m. – 1:00 p.m. CST

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Today's Topic

- **Headline News –**

  The Patient Protection and Affordable Care Act: Beyond the Newsletters

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Today's Speakers

- **Gregg H. Dooge**
- **Andrew D. Gregor**

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Headline News

The Patient Protection and Affordable Care Act: Beyond the Newsletters

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Headline News

Introduction

- Newsletters generally cover “nuts and bolts” of new employer mandate rules
- Today, we will do the following:
  - Quick refresher on PPACA (background for remainder of discussion)
  - Discuss selected points that
    - might not have been covered in the newsletters, or
    - covered but a way that doesn’t address the options or decision points that an employer might have
  - Understand that PPACA compliance isn’t a “one size fits all” proposition
    - You will need to understand options and what is best for your organization

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Quick Primer on PPACA

- PPACA might be thought of as consisting of three 3 parts
  1. The Marketplace (Health Insurance Exchanges)
     - Individuals may purchase coverage
     - Taxpayers with household income less than or equal to 400% of federal poverty line might qualify for credits
  2. Legal Rules
     - Substantive legal rule, e.g., things that must be done, and mandatory plan design features
  3. Tax Rules
     - The employer mandate fits here

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Headline News

The Employer Mandate

- Employer mandate is a tax rule that is implemented through two penalty provisions
- Penalty #1 (Requirement to Offer Coverage)
  - No penalty in 2014
  - Applies in 2015 if employer does not offer coverage to 70% of its full-time employees
  - Applies in 2016 if employer does not offer coverage to 95% of its full-time employees

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Headline News

The Employer Mandate

- Penalty #1 (continued)
  - Penalty is $2,000 per full-time employee (when expressed on an annual basis)
  - First 80 (for 2015) or 30 (thereafter) are free -- no penalty
  - Applies with respect to all full-time employees (other than first 30 or 80), whether or not offered coverage
    - Example, if employer has 6,000 full-time employees in 2016 but does not offer coverage to sufficient employees, the penalty (expressed on an annual basis) is:

      (6,000 – 30) X $2,000 = $11,940,000

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The Employer Mandate

- Penalty #2 (Minimum Value/Affordability)
  - No penalty in 2014
  - Applies in 2015 and subsequent years unless offered coverage provides “minimum value” and is “affordable”
  - Minimum Value
    - Actuarial determination of whether the plan is expected to pay at least 60% of covered medical expenses, taking into account deductibles, co-pays, etc.
  - Affordability
    - Cost for employee-only coverage does not exceed 9.5% of household income

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The Employer Mandate

- Penalty #2 (continued)
  - Penalty amount (when expressed on an annual basis) is $3,000 per full-time employee who receives a premium credit or subsidy in the Marketplace
  - Penalty applies only with respect to those full-time employees who receive premium credit or subsidy

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Topic #1: Legal Rules vs. Tax Rules

- PPACA affirmatively requires certain things (Legal Rules):
  - No lifetime benefit dollar limit
  - Restrictions on annual benefit dollar limits
  - Coverage of dependent children through age 26 (for plans that provide dependent coverage)
  - 90 day maximum waiting period
- The employer mandate -- requirement to offer coverage -- is a Tax Rule

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Topic #1: Legal Rules vs. Tax Rules

- Why is the distinction important?
  - A variety of sources describe both the Legal Rules and the Tax Rules as “required”
  - This is not correct
  - Under the Tax Rules, various actions might be advisable (in order to avoid a tax penalty)
  - However, the Tax Rules do not require anything, and there may be times when an employer might want to adopt a particular plan design, even if the Tax Rule is not satisfied

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Topic #1: Legal Rules vs. Tax Rules

- Penalty #2 (the minimum value and affordability rules) is an example of where this might occur
  - Newsletters or seminar speakers proclaim that the employer coverage must provide "minimum value" and be "affordable"
  - Not quite. More accurately, the coverage must provide "minimum value" and be "affordable" in order to avoid Penalty #2.
  - However, might there be situations in which an employer concludes that payment of Penalty #2 is preferable to providing minimum value, affordable coverage?
    - Compare cost of providing minimum value, affordable coverage vs. the potential Penalty #2 amount
    - Key point is that because this is a Tax Rule, an employer might have options

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Topic #2: The Affordability Rule

- General rule: Coverage is affordable if employee's required contribution (for employee only coverage) does not exceed 9.5% of household income
- IRS has issued other safe harbors, including 9.5% of employee's W-2 wages
- Newsletters/commentators frequently suggest that an employer must or should adopt one of these rules (usually the 9.5% of W-2 earnings safe harbor)

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Topic #2: The Affordability Rule

- Its more complicated than this.
  - Per Topic #1, the affordability rule is a Tax Rule, not a Legal Rule
  - Employer needs to analyze whether adoption of one of the safe harbors is desirable
    - Adoption of safe harbor might be desirable, but it is not required
    - What happens if employer applies its standard contribution schedule?
      - For how many employees might the standard schedule produce an employee contribution greater than 9.5% of W-2 wages?
      - Of those, how likely is it that employees obtain coverage (and premium subsidy) through the Marketplace?
    - Consider unintended consequences
      - What is the contribution for an employee who is on an unpaid leave of absence if the W-2 safe harbor is being used?

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Topic #3: Challenging Assumptions

- PPACA cost estimates might be based on partial or misleading information
  - Example: Employer has 238 full-time employees not currently offered coverage. Consultant calculated estimated cost increase to offer coverage at $2.8 million.
- $2.8 million estimate likely assumes:
  - All employees enroll.
  - Coverage under same terms and conditions as apply to all other eligible employees.
- Consistent with Topics #1 and #2, there is no requirement that the 238 be offered coverage on the same terms and conditions
  - For example, employer could offer comparable coverage with a high (COBRA-like) employee contribution
  - Might be subject to Penalty #2, but avoid Penalty #1

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Topic #4: Must an Employer Count Hours?

- Employer mandate applies to full-time employees.
  - 30 hours per week
- General rule
  - Month-by-month determination
  - If employee (who has completed initial 90 day eligibility waiting period) averages more than 30 hours per week during a month, employee is a full-time employee for that month.
    - Logistical issue with waiting until last day of month to determine if employee is entitled to coverage for that month.

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Topic #4: Must an Employer Count Hours?

- Look Back Method
  - IRS regulations permit employer to use “look back” and “stability” period concepts
    - For new employees, e.g., first year of employment, may use only if it is not known (at the time of hire) whether the employee will average 30 or more hours per week.
    - For on-going employees, use hours during a period (the look-back period) to determine whether an employee will be treated as a “full-time” employee during the succeeding period (the stability period).

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Headline News

Topic #4: Must an Employer Count Hours?

- Newsletters frequently discuss only the Look-Back Method, suggesting that it is required.
- For many employers, the Look Back Method will be the preferred method
  - Employers with variable hour work forces
- However, if an employer only has “regular, full-time” employees (or part-time employees with stable hours), might the employer simply offer coverage to everyone scheduled to work 30 or more hours per week?
  - What purpose is served by counting hours?

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Topic #5: Independent Contractors

- Traditional independent contractor vs. employee issues
  - Employer responsibility for income tax and FICA/Medicare tax withholding
  - Eligibility of service provider for employer-sponsored benefit plans, e.g., the 401(k) matching contribution
- Employee vs. independent contractor issues now relevant for purposes of Penalty #1 and Penalty #2
  - If independent contractor is reclassified as an employee, is the 95% test (70% for 2015) still satisfied?
  - Reliance on independent contractor to avoid application of PPACA’s 50 full-time equivalent employee threshold (100 for 2015) could be problematic
  - Thus, employee classification takes on added importance, especially if margin for error on 95% test is thin.

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Topic #6: Beware the Small Subsidiary

- For Penalty #1, the 95% test (70% for 2015) is applied on an entity-by-entity basis.
  - Different than the way most benefit plans are designed and administered.
    - Many businesses have a common plan design and centralized benefits administration, meaning that for employee benefit purposes, whether an individual is an employee of Company #1 or Company #2 frequently is not relevant to daily operations.
  - However, identifying the specific entity that employs each full-time employee is critical for the 95% test because each company must separately satisfy the 95% test with respect to its employees.
    - Potential for a violation might be greater, especially if non-benefit eligible employees are concentrated in one company (although amount of Penalty #1 might be smaller because it is calculated only with respect to full-time employees of that entity). Employer does not get to choose allocation of 30/80 "free" employees.
- The smaller the entity (in terms of employees), the more likely it is that the exclusion of a few employees might be important to the 95% test.

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Topic #7: Phantom Exemptions

- Reminder: There are no blanket exemptions for
  - Collectively bargained employees
  - Temporary employees
- Bargaining unit employees
  - Even if bargaining agreement provides for a class of employees who are not benefit eligible (a permissible collective bargaining provision), that does not provide the employer with an exemption with respect to those employees for purposes of the Tax Rules (Penalty #1 and Penalty #2).
  - Union-sponsored plans generally treated as employer-provided coverage, but employer might want to confirm compliance with PPACA requirements.

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Topic #7: Phantom Exemptions

- Temporary Employees
  - No blanket exemption.
  - If a full-time employee, can delay coverage for 90 days under permitted waiting period rules.
  - Thereafter, must determine employee's "full-time" status same as any other employee
    - If temporary employee is regularly expected to work 30+ hours per week, cannot apply "variable hour" rules to further delay entry.
    - Won't be able to take into account that employee is not expected to work for entire year in determining average hours worked
    - If don't offer coverage, Penalty #1 and Penalty #2 may be applicable
      - As per earlier topics, coverage offered need not be identical to coverage offered to other full-time employees..

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Contact Information

- **Gregg H. Dooge**
  414.297.5805
  gdooge@foley.com

- **Andrew D. Gregor**
  858.847.6734
  agregor@foley.com

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