Health Care Reformfor Employers:

ACADESIGN AND PLANNING OPPORTUNITIES

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ACA DESIGN AND PLANNING OPPORTUNITIES

1. PLAY OR PAY DECISIONS.

1.1. ACA's Shared Responsibility Requirement.

(a) When effective, the ACA "Employer Mandate" will require large employers to offer health coverage to full-time employees and their children up to age 26 or risk paying a penalty. Applicable employers must decide to either "play" by offering affordable health coverage that provides minimum value or "pay" by potentially owing an IRS penalty for failure to offer complying coverage. Under the regulations the Play or Pay choice is referred to led "shared responsibility" certain requirements.

(b) Effective January 1, 2015, but different effective date for fiscal yearplans.

1.2. Large Employer Status.

(a) The requirements are applicable only to "large employers" generally ***defined*** as employers having an average of 50 or more full-time or full-time equivalent employees on business days during the preceding year. "Full-time employees" include all employees who work at least 30 hours on average each week Monthly equivalent is 130 hours per month). The number of "full- time equivalent employees" is determined by aggregating the hours worked by all non-full-time employees, and dividing by 120 hours.

(b) For employers with work force fluctuations can use a measurement period of 3 to 12 months, with a subsequent stability period.

1.3. Control Group Status. In determining large employer status, certain relatedemployers under common control are considered to be a single employer. While control group members may be aggregated for determining large employer status, penalties may be calculated separately for each related employer.

1.4. No Coverage Penalties. The "No Coverage Penalty" applies if an employerdoes not offer health coverage to "substantially all" of its full-time employees and *any one* of its full-time employees both enrolls in health coverage offered through a State Exchange and receives a premium tax credit or a cost-sharing subsidy (collectively "Subsidy"), the employer will owe a "no coverage penalty." The No Coverage Penalty is $2,000 per year (adjusted for inflation) for each of the employer's full-time employees (excluding the first 30).

1.5. Inadequate Coverage Penalty. The "Inadequate Coverage Penalty" applies ifan employer does provide health coverage to its employees, but such coverage is deemed inadequate for Employer Mandate purposes, either because it is not "affordable," does not provide at least "minimum value," or the employer offers coverage to substantially all (but not all) of its full-time employees and *one or more* of its full-time employees both enrolls in coverage from a State Exchange and receives a Subsidy. The Inadequate Coverage Penalty is $3,000 per FTE enrolling in a State Exchange and receiving a Subsidy.

1.6. Subsidy Eligibility. Subsidies are available only to individuals with householdincomes of at least 100 percent and up to 400 percent of the federal poverty level (in 2013, a maximum of $45,960 for an individual and $94,200 for a family of four).

(a) Employers with a generally high wage base may not be at risk for the Inadequate Coverage Penalty.

(b) Subsidies are not available to individuals who are eligible for Medicaid, which may also shelter many employers for excessive penalties.

(1) Review status of low wage employees and their receipt ofMedicaid.

(2) Take into account other household income.

(3) Subsidies will not be available to any employee whose employer offers the employee affordable coverage that provides minimum value. Thus, by "playing" for employees who would otherwise be eligible for an Exchange subsidy, employers can ensure they are not subject to any penalty, even if they don't "play" for all employees.

1.7. Play or Pay Decisions.

(a) Control Group Analysis. The ACA requires that the determination of the employer includes not only the single-employer under consideration, but all members of the "controlled group." See IRC §4980H(c)(2)(C)(i) and ERISA §715(a)(1). For the time being, the Proposed ACA Regulations issued in January 2013, reserve the application of the Controlled Group rules for governmental employers; yet, under the regulations, the government units must still make a good faith effort at ACA compliance based upon the current controlled group regulations now in effect for other benefit plan requirements.

(b) Under the ACA separate employing units will be aggregated as the single-employer utilizing the following statutory requirements:

(1) IRC §414(b) Parent/Subsidiary Ownership;

(2) IRC §414(c) Common Control Entities;

(3) IRC §414(m) Affiliated Service Group.

(c) Controlled Group Rules must be used for other ACA purposes:

(1) Employer Mandate for coverage (50 or more employees);

(2) Determining full-time or full-time equivalent employees;

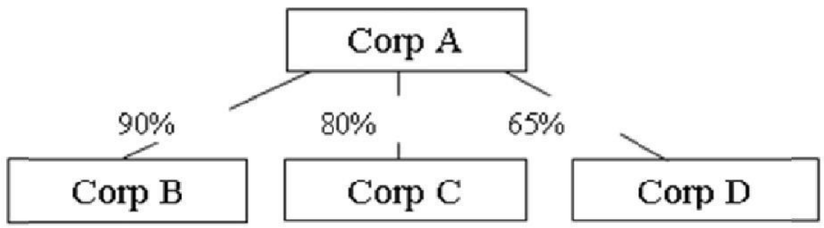
(3) Automatic enrollment requirements (200 or more employees);

(4) Access availability to State Exchanges (less than 101 employees);

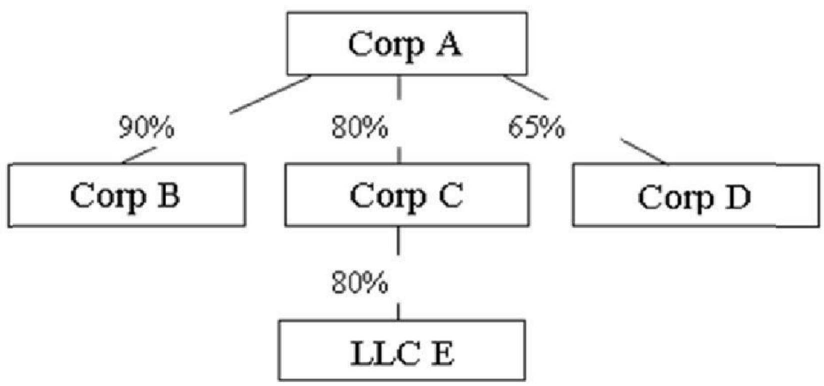
(5) Head count for employer penalties; and

(6) Non-discrimination measurements for fully insured plans (IRC§ 105(h)).

(d) Entitiesare treated as a single employer if the common parent employer owns, directly or indirectly, 80% or more of the stock of a for-profit corporation. In the case of non-corporate entities (limited liability companies, partnerships, etc.), the 80% ownership rule is applied to the membership interests (for LLCs) or to the capital and profits interests of a partnership.



Control Group A, B and C



Control Group A, B and C, LLC E

(b) A brother-sister controlled group is a group of two or more entities, in which five or fewer common owners (a common owner must be an individual, a trust, or an estate) own directly or indirectly a controlling interest (80%, but only if the common owner owns
stock or equity in each entity) of each group and have "effective control" (50% , but only to the extent such equity ownership is identical with respect to such entity).

Example 1:

Owner	Corp 1	Corp 2
A	80%	2 %
B	10%	5 %

C	5%	15%
D	5%	15%
TOTAL	100%	100%

Analysis:

Step 1: Do 5 or fewer common owners own more than 80% - yes, then go to step 2 Step 2: Determine identical ownership – more than 50% identical ownership - no

Owner A = 20%
Owner B = 10%
Owner C = 5%
Owner D = 5%
TOTAL 40%

Example 2

Owner	Corp 1	Corp 2
A	12%	12%
B	12%	12%
C	12%	12%
D	12%	12%
E	13%	13%
F	13%	13%
G	13%	13%
H	13%	13%
TOTAL	100%	100%

Step 1: Do 5 or fewer common owners own more than 80% - no, no need for step 2
Step 2: Determine identical ownership – more than 50% identical ownership – yes but failed step 1.

1.8. Evaluating Controlled Group Status. In evaluating controlled group status,the employer must also consider the ownership attribution rules. Attribution requires treating a person as owing an interest in the entity even if they are not the actual owner. IRC §1563 attribution is used in determining ownership under the ACA (required by IRC §414(b) and (c).

The following table is a general description of how the family attribution rules are applied to controlled groups.

THE OWNERSHIP OF INTERESTS OF:	Are attributed to:	
Spouse	Spouse	EXCEPTION: No attribution between spouses if there is no: direct ownership, participation in company, and no more than 50% of business gross income is passive investments. See 1.414(c)-4(b)(5)(ii)
Minor child (under age 21)	Parent	
Parent	Minor child (under age 21)	
Parent	Adult child (age 21 or older)	ONLY IF: Adult child owns greater than 50% of that business.
Adult child	Parent	ONLY IF: Parent owns greater than 50% of that business.
Grandparent	Minor or Adult child	ONLY IF: Minor/Adult child owns great than 50% of that business
Minor4 or Adult child	Grandparent	ONLY IF: Grandparent owns greater than 50% of that business.
Sibling	None	None

1.9. Affiliated Service Groups. The Affiliated Service Group rules were codifiedin IRC §414(m) in order to close the loophole previously common among professional service type organizations (medical practices, law firms, insurance agencies, etc.) where the service organization would utilize outside entities to supply the rank and file employees. The most typical example would be a medical practice where the physicians would be employed by the medical firm, and the physicians would form their own outside organization to hire rank and file employees necessary to operate the practice (clerks, nursing staff, billing staff, etc.). Utilizing these types of arrangements, the physicians could maintain rich benefit structures for the physicians which would not be extended to the "hired employees" of the leasing organization.

1.10. Leased Employees and Independent Contractors. The ACA Regulationsdefine employees to include "leased employees" (under IRC §414(n)), as well as misclassified independent contractors.

1.11. Applying Pay or Play to Control Groups.

2. CALCULATION STRUCTURE.

2.1. Questions.

(a) Is this a large employer?

(b) If so, does the employer offer qualified health insurance to substantially all full time employees?

(c) How many, if any, full time employees receive Subsidies?

(d) If the employer is a large employer and at least 1 full time employeereceives a Subsidy, how much does the employer owe?

2.2. Basis for Penalty.

(a) Large employer status based on full time equivalent employees (FTE),while penalties based on full time employees (FT).

(b) No Coverage Penalty based on FT (excludes first 30 FT).

(c) Inadequate Coverage Penalty based on FT who are certified to the employer as having received a Subsidy.

2.3. Planning Opportunities for Play or Pay.

(a) Do I provide coverage, or not?

(b) Keep in mind that all arrangements must also be measured taking intoaccount the non-discrimination rules under 105(h).

(c) Firm ownership and use of independent resources.

(d) Professional Firms with large percentages of highly compensated individuals.

(1) The Employer Mandate penalty applies only to an employer failingto offer health coverage if one or more of its full-time employees enrolls in Exchange coverage, and actually receives either a Subsidy.

(2) Unless a full-time employee enrolls in an Exchange and obtains theSubsidy, the employer is not subject to the penalty.

Example: Employer 1 is a professional firm with 50 full-time employees. 40 are licensed professionals with annual incomes in excess of $120,000. Assume the remaining 10 employees are administrative in nature with income below the minimum levels (assume $40,000).

3. GOVERNMENT AND NON-PROFIT EMPLOYERS.

3.2. Parent Subsidiary Ownership.

(a) Current law requires that a governmental or non-profit entity and its for-profit subsidiaries be treated as a single employer if the governmental employer owns, directly or indirectly, 80% or more of the stock of a for-profit corporation. In the case of non-corporate entities (limited liability companies, partnerships, etc.), the 80% ownership rule is applied to the membership interests (for LLCs) or to the capital and profits interests of a partnership. Rarely will the Parent/Subsidiary Ownership rules be an issue with governmental entities, but it is not uncommon for non-profits to invest in for profit subsidiaries. . While we have encountered a few occasions when a governmental unit may own a for-profit entity, it is an unusual situation.

(b) We do, on occasion, find that governmental employing units (such as counties or cities) do have controlling interest in non-profit entities, which in turn may own controllingNone of the professionals will be eligible for a Subsidy. The Employer could avoid any penalty by simply offering insurance to the 10 rank and file employees. That ultimately be accomplished though the small business (SHOP) Exchange. interests in for-profit subsidiaries used for investment purposes.

3.4. Common Control Test. In 2007 the Internal Revenue Service issued TreasuryRegulation 1.414(c)-5 requiring the aggregation of tax-exempt employers for employee benefit plan purposes. The regulations, which were effective for plan years beginning on or after January 1, 2009, apply to all tax-exempt organizations, including governmental units. ACA now requires the application of these aggregation rules for governmental entities.

(1) Common Control exists between a governmental entity andanother non-profit organization if at least 80% of the directors or trustees of the non-profit organization are either representatives of, or directly or indirectly controlled by, the governmental entity. A trustee or director is treated as a representative of the governmental entity if the individual is a trustee, director, agent, or employee of the governmental entity. A trustee or director is controlled by the governmental entity if the governmental entity has the general power to remove such trustee or director and designate a new trustee or director. Whether a person has the power to designate or remove a director or trustee is based upon the facts and circumstances.

Example 1: Assume that Hospital H is located in the area of City C. Hospital H is a not-for-profit organization and is managed by its Board of Directors, comprised of 10 individuals. Under H's Bylaws, 6 of the 10 directors are appointed by the C's City Council. In this example, since only 60% of the Board is appointed by City C, the entities are treated as separate entities and not as a single entity.

Example 2: Assume the same facts as outlined in Example 1 above, except that 6 of the directors are appointed by City C and 2 of the remaining directors, although not appointed by City C, are employed by City C. In this example, C and H are to be treated as a single-employer because 80% of the Directors of H represent City C (6 directors are appointed by C and 2 other directors are employed by C).

Example 3: Assume that City C provides 90% of the funding for a non-profit emergency medical service entity (EMS), which provides emergency services in the geographical area of City C. EMS has its own Board of Directors, none of whom either work for or are appointed by City C. Despite the high level of funding, the non-profit entity EMS would not be aggregated with City C.

Example 4: Assume the same facts set forth in Example 3, except for the fact that the initial Board for the non-profit entity (EMS) was appointed by City C, and thereafter the Board was self-sustaining with new members of the Board being elected by the current Board of Directors. In this example, even though the initial board was appointed by City C, the City does not have the continuing right to appoint or remove the directors; thus, the entities are not aggregated. Example 5: Assume the same facts as set forth in Examples 3 and 4 above, except that City C retains the right to remove one or more of the Board members, at any time and to replace the Board with new members. Because of the right of City C to remove and replace one or more of the Directors (up to all of the Directors) of EMS, the entity would be aggregated with City C.

4. WAITING PERIODS.

4.1. ACA General Requirements.

(a) 90 maximum waiting period (PHS Act §2704(b)(4) (before coverage becomes effective).

(b) Employees can elect to wait longer.

(c) Distinguish eligibility period and waiting period. The plan can impose eligibility periods based on professional licensure, working full time, etc. If it cannot be determined that a newly-hired employee is reasonably expected to regularly work that number of hours per period (or work full-time), the plan may take a reasonable period of time to determine whether the employee meets the plan's eligibility condition, which may include a measurement period of no more than 12 months that begins on any date between the employee's start date and the first day of the first calendar month following the employee's start date. Except for cases in which a waiting period that exceeds 90 days is imposed in addition to a measurement period, the time period for determining whether a variable-hour employee meets the plan's hours of service per period eligibility condition will not be considered to be designed to avoid compliance with the 90-day waiting period limitation if coverage is made effective no later than 13 months from the employee's start date, plus if the employee's start date is not the first day of a calendar month, the time remaining until the first day of the next calendar month.

4.2. Planning and Compliance Discussion.

5. COUNTING HOURS.

5.1. FT and FTE

(a) Employee status determined under common law principles.

(b) Count PTO.

(c) Seasonal workers – If employer excess 50 for no more than 120 calendar days (or 4 months) during the year due to seasonal workers, the employer is not an applicable large employer.

(d) In determining whether an employer is an applicable large employer for the current calendar year, section IRC §4980H(c)(2)(E) provides that the employer must calculate the number of full-time equivalent employees (FTEs) it employed during the preceding calendar year and count each FTE as one full-time employee for that year. The proposed regulations apply this provision using the calculation method for FTEs that was included in Notice 2011-36. Under that method, all employees (including seasonal workers) who were not full-time employees for any month in the preceding calendar year are included in calculating the employer's FTEs for that month by (1) calculating the aggregate number of hours of service (but not more than 120 hours of service for any employee) for all employees who were not employed on average at least 30 hours of service per week for that month, and (2) dividing the total hours of service in step (1) by 120. This is the number of FTEs for the calendar month.