Affordable Care Act - Questions and Answers

Question: What if any penalties would be assessable to an employer with less than 50 full time employees under PPACA?

Answer: Employers with less than 50 full time employees are not subject to penalties under the Act. But be mindful that under the Act, both full-time (persons working 30 or more hours per week) and part-time employees are taken into account when determining if an employer is an "applicable large employer" to whom penalties may be assessed.

Question: Will we need to change our plans from 50/50 to a 60/40?

Answer: Under the Act, the "minimum value requirements" state that a plan fails to provide minimum value if "the plan's share of the total allowed costs of benefits provided under the plan is less than 60 percent of such costs." Further guidance is expected on how to determine whether health coverage actually provides this "minimum value," including an actuarial value calculator and safe harbor checklists.

Question: Can the employer contributions still be 100% for administrator premiums and different amounts for other groups of employees? Will teachers receive $385, custodians $320 etc. towards their health insurance premium?

Answer: The non-discrimination provisions of the Act will require all employees (other than those in a collective bargaining unit) to receive the same amount of contribution. I say "will require" because the non-discrimination provisions will not go into effect until further guidance is offered. When that guidance is provided, it is anticipated that there will be sufficient time provided to allow employers to come into compliance, whatever is required.

Question: If the employer contribution is enough for teachers, but not high enough for aides and custodians, am I better off to pay the penalty?

Answer: Whether any employer will be better off paying a penalty is a case-by-case determination that should be made after determining costs of meeting safe harbors for "affordability" for the individual employees, number of employees who may possibly be enrolled in an Exchange (despite being offered employer-sponsored coverage) and eligible for a tax credit.

Question: If having to pay the penalty, would it be paid for the aides and custodians, or paid on all eligible full time staff?

Answer: Penalties for the shared responsibility portion are tied to the full-time employees (but not full-time equivalent employees) and not directly connected with their position in the school. In order for any penalty to be assessed to the employer, at least one full time employee must be enrolled in the Exchange and receive premium tax credit. If that happens, here's how the penalties are set up:

Employers who DO NOT offer coverage:

Penalty of $2,000 per year times number of full-time employees, less 30

Employers who DO offer coverage:

Penalty of $3,000 per full time employee actually receiving the premium tax credit

Except: (1) new full time employees in first 3 months, (2) new variable hour or seasonal employees, and (3) employees offered minimum essential coverage that satisfied minimum value and met a safe harbor.

This total amount cannot exceed the penalty that would be incurred had the employer not offered coverage ($2,000 x number full-time employees less 30)

Question: When calculating yearly wage for hourly, why does the formula use 130 hours and not 160 hours (40 hours a week for four weeks)?

Answer: The standard of 130 hours of service per calendar month takes into account that the average month consist of more than four weeks (52x30/12=130) (explanation provided in IRS Notice 2011-36)

Question: The percentage of poverty level - does that figure into calculating group insurance premiums and the amount to be paid by the employee?

Answer: Yes; with regard to an affordability "safe harbor", one such safe harbor is based on the federal poverty level (coverage is affordable if the employee's cost for single-only coverage under the plan does not exceed 9.5% of the poverty line for a single individual). The poverty level also comes into play in determining whether an individual qualifies for a premium tax credit (eligible if not eligible for employer offered coverage or a government program, are lawfully in the USA, and have modified adjusted gross household income between 100% and 400% of the federal poverty level). Individuals who are offered coverage by their employer are generally not eligible for a premium tax credit, but can be if the employer's coverage costs more than 9.5% of income or does not provide minimum value (i.e., covers less than 60% of medical costs).

A School District is an applicable large employer as that term is defined by the Affordable Care Act. The facts presented are that the School offers employer sponsored coverage for all employees who provide 20 or more hours of service per week, and that the coverage carries a $1,500 deductible. The District contributes an amount toward the cost of coverage, based upon four categories: certified full-time staff (30 or more hours per week), certified staff 20-30 hours per week, non-certified full time staff, and non-certified staff 20-30 hours per week. Employees working less than 20 hours per week receive no contribution from the school.

Question: Will the school district be subject to a penalty under these facts?

Answer: In determining whether penalties would be assessed under the Affordable Care Act, it is the employee's share of the cost rather than the amount of employer contribution that is the focus of the calculation – is the coverage "acceptable and affordable." If the school offers health insurance coverage, it will not be penalized unless at least one full-time employee obtains a premium credit in an Exchange as a result of the employer's insurance being either not "acceptable coverage" or not "affordable" under the respective standard:

1. Whether the insurance coverage provided is "acceptable coverage"
   - Does it pay for at least 60% of covered health care expenses?

2. Whether the coverage is "affordable"
   - If employee's contribution for self-only coverage exceeds 9.5% of the employee's income, employer may be penalized
   - Safe harbors to determine include the percentage of employee contribution to health care coverage include (1) Form W-2 safe harbor, (2) rate of pay safe harbor, and (3) federal poverty level safe harbor

Under these guidelines, your analysis to determine whether the coverage is "affordable" is to look at each full-time employee and consider, using one of the "safe harbor" methods, what percentage of that person's income the employee's contribution for coverage amounts to. If the amount the full-time employee contributes to self-only coverage exceeds 9.5% of that employee's income, the employer may be assessed a penalty.

The amount of annual penalty to an employer who does offer health insurance coverage to its employees is the lesser of:

- The number of full-time employees minus 30 x $2,000, or
- The number of full-time employees actually receiving a credit for exchange coverage x $3,000

Other considerations:

- Are dependents of full-time employees offered coverage under the school's plan? (IRS proposed regulations define "dependents" as an employee's child who is under 26 years of age; it does not include spouse or any other individual other than children.) An applicable large employer is subject to a penalty if it fails to offer its full-time employees, and their dependents, the opportunity to enroll in affordable, acceptable coverage.

- Are all full-time employees offered coverage? Safe harbor regulations state that coverage must be offered to all but 5% (or if greater, 5) of its full-time employees

Question: Is full single the only option you have to offer any employee who is over the 30 hour threshold?

Answer**:** The plan must meet affordability criteria, which is that the employee's share of the premium for employer-provided coverage may not cost the employee more than 9.5% of that employee's annual household income. If an employer offers multiple healthcare coverage options, the affordability test applies to the lowest-cost option available to the employee that also meets the minimum value requirement. What constitutes "minimum value" has yet to be outlined.

Question: What if you have a bus driver that is over the 30 hour threshold this year, but you are not sure if they will cross it next year?

Answer**:** There are two possible responses to this question: (a) dealing with whether the employee is a "full-time employee" in the upcoming year for purposes of determining whether the employer is a "large employer"; and (b) dealing with whether the employee is full-time for purposes of being offered coverage and for liability/penalty purposes.

Under (a), considering the employee's hours of service in the context of determining whether the employer is a "large employer," the employee's hours are looked at, separately, on a monthly basis. Employees who average 30 hours per week are considered "full-time"; for employees who are employed on average less than 30 hours per week for the month, the total hours are added, that number divided by 120, and that number added to the number of "full-time" employees to determine if there are fifty or more full-time/full-time equivalent employees for the calendar year. "Transitional relief" has been for determining "large employer" status for the 2014 calendar year, allowing employers the option to determine its status as a "large employer" for 2014 by referencing a period of at least six consecutive months, as chose by the employer, in the 2013 calendar year. Thus, an employer may determine whether it is a "large employer" for 2014 by determining whether it employed an average of at least 50 full-time employees during any consecutive six-month period in 2013.

Under (b), whether the employee is full-time for purposes of being offered coverage and for liability/penalty purpose under the shared responsibility provisions of the Act, the hours actually worked are used in determining whether the employee is "full-time." For employees paid on an hourly basis, the hours worked during each month must be calculated from records of hours worked. For employees paid on a non-hourly basis, one of three methods must be used in calculating hours of service: (1) actual hours of service from records of hours worked; (2) days-worked equivalency, where the employee is credited with eight hours of service for each day for which the employee would be required to be credited with at least one hour of service; or (3) weeks-worked equivalency where the employee is credited with 40 hours of service for each week for which the employee would be required to be credited with at least one hour of service.

Under this analysis, a look-back period may be used. A "look-back period" is a safe-harbor under which an employer may determine each ongoing employee's full-time status by looking back at the "standard measurement period" of between three and twelve consecutive months. If the employer determines that an employee averaged at least 30 hours per week (or 130 hours per month) during the "standard measurement period," the employer must treat the employee as a full-time employee during the subsequent "stability period," regardless of the number of hours actually worked by that employee. Conversely, if the employee did not work at least 30 hours per week (or 130 hours per month) during the "standard measurement period," the employer would not need to treat the employee as full-time during the stability period. The "stability period" must be at least six consecutive calendar months, but may not be shorter than the standard measurement period used by the employer.

Question: How does a substitute teacher fit into the whole process? They are really not an employee, but they may work more than 30 hours for you.

Answer: Unfortunately, there is little guidance on this question. The National School Board Association recently submitted requests for clarification on issues of substitute teachers, as well as on independent contractors and individuals performing extracurricular or additional duties. It is possible that the proposed regulations may make a substitute working an average of 30 hours per week over the long-term (more than 3 months) into a full-time district employee who must be offered health coverage before the end of that employee's third full month of employment, but for the time being we do not know.

Question: How will all of this play into negotiations for the current year? Is there any sort of forgiveness based on implementation?

Answer**:** Transition relief is set out in the proposed regulations that recognize the difficulty in changing terms and conditions of coverage mid-year, delaying the penalty for not providing affordable minimum coverage to full-time employees until the first day of their 2014 plan year. If a large employer maintains a fiscal year plan as of December 27, 2012, the transition relief applies with respect to employees who would be eligible for coverage as of the first day of the first fiscal year of that plan that begins in 2014, if the following conditions are satisfied: (1) the health plan meets "minimum value" and "affordability" standards by the first day of the 2014 fiscal year plan, and the fiscal year plan (a) was offered to at least 1/3 of employees (full-time and part-time) or, (b) the fiscal year plan covered at least 25% of the employees.

Question: Does the ACA affect retiree and/or COBRA insurance? We currently have retirees and COBRA former employees pay the entire health insurance premium.

Answer: The Affordable Care Act does not directly impact COBRA, although the expected indirect effect is that it will over time lessen use of COBRA due to the Act prohibiting pre-existing conditions exclusions and creating an Exchange where, at least theoretically, coverage will be available at affordable rates.

Because these individuals are no longer "employees" (defined as "an individual who is an employee under the common-law standard"), they would not be taken into consideration with regard to an employer's "shared responsibility" requirements or non-discrimination.

Question: We currently pay the superintendent's full health insurance premium. We don't pay the full amount, but pay more of the premium for other administrators (principals/business manager) than we do for teachers or classified staff. We pay more for teachers than for classified staff. In a nutshell, we have four tiers: Supt. – other administrators – teachers – classified staff. Will we need to change this practice?

Answer: Very likely, yes. The Act's non-discrimination provisions require that higher compensated employees may not receive an unfair advantage regarding the quality or the premium payment for health insurance. However, exactly now the "non-discrimination" provisions will be applied is not yet known. The Department of Treasury and the IRS published Notice 2011-1, in which it is noted that "because regulatory guidance is essential to the operation of the statutory provisions," compliance with non-discrimination provisions should not be required until regulations or other guidance is issued, and it is expected that time will be allowed in order to implement any changes required before any sanctions for failure to comply would be imposed.

Question: Do districts need to be concerned about which plan we use in order to be considered "acceptable and affordable"? We currently offer $1,000/$1,500/$2500.

Answer: Under the "acceptable" prong of the Affordable Care Act, the health plan offered must pay for a minimum of 60% of the costs for "essential health benefits." The amount of deductible will likely be a factor in that calculation.

Question: Do employers whose employees belong to a union change any aspect of the new requirement?

Answer: Employees in a collective bargaining unit may impact the non-discrimination determinations as to whether an employee is a "highly compensated individual" within the meaning of the Act.

Question: If the employer is contributing enough for one group of employees (teachers and administrators) but not high enough for other groups of employees (para-professionals and custodians) are we better off paying the penalty?

Answer: You may be, but whether any employer will be "better off" paying a penalty is a case-by-case determination that should be made after determining costs of the contributions as compared to the cost of potential penalties.

Question: If a district chooses to pay a penalty for not offering the insurance, is the penalty paid for the total number of eligible full-time employees in the district or is the penalty assessed on just the number of full-time employees that aren't meeting the requirement?

Answer: This question implicates the shared responsibility provisions of the Act. Under those provisions, the penalty that may be assessed against an employer for not offering coverage to its full-time employees is $2,000 per number of full-time employees, less 30 full-time employees.

Question: When calculating the poverty level and the percentage paid by the employee, do you base that figure on lowest paid employee and highest plan offered (family plan) or can you base it on the lowest plan (single plan) offered to employees?

Answer: I understand this question to be about the "affordability" prong of the shared responsibility aspect of the act – whether the coverage offered by the employer satisfies the 9.5% "affordability" test. This is done on an employee-by-employee basis, looking at each employee's situation. The proposed regulations state that under the safe harbors, it is the employee contribution toward the self-only premium for the employer's lowest cost coverage that provides minimum value that must not exceed 9.5% of the employee's wages.

The proposed regulations note that it is possible that an employer could be considered as offering "affordable" coverage to an employee for purposes of determining whether the employer is subject to a penalty, while that same coverage could be treated as "unaffordable" for purposes of determining whether the employee is eligible for a premium tax credit.

Question: Grandfathered plans – how do you know if your plan qualifies and are there any advantages from being grandfathered in? Do you lose this status if you change your coverage amounts or provider?

Answer: Grandfathering status is not necessarily lost when coverage amount or provider is changed. Routine changes may be made to plans that existed on March 23, 2010 without losing grandfather status. Plans will lose their "grandfather" status if there are significant cuts to benefits or increases to out-of-pocket spending or consumers. Reasons grandfathered plans will lose that status include if there is a significant cut or reduction in benefits, a raise in co-insurance charges, a significant rise in co-payment charges, a significant rise in deductible, a significant lowering of employer contributions, or if they add or tighten annual limits on what the insurer pays.

Question: What are the minimum amount of hours a staff member can work in order for districts to have to provide insurance? For example, could a school district specify in their negotiated agreement that staff must work 30 hours in order to be eligible for insurance coverage?

Answer: To be clear, the Affordable Care Act does not "require" that an employer offers health coverage to its employees; it does, however, impose penalties if certain conditions are met. Under the current proposed regulations, an "applicable large employers" (employing over 50 full-time or full-time equivalent employees) in general may be assessed a penalty based on the number of "full-time" employees, meaning employees who provide on average 30 or more hours of service per week. Whether an employer is considered to "offer" or to "not offer" coverage is determined by looking at whether coverage is offered to its full-time employees. For employers who do offer coverage to its full-time employees, any such employees who are offered an opportunity to enroll in coverage and for whom an affordability safe harbor is met will be excluded in the penalty calculation.

Question: What is the opinion for upper level employees? For example, will districts be able to offer staff in a higher class more insurance benefits, or pay more of the benefits, than those working in a lower class? For example, most schools pay more of their superintendent and/or principals premiums. Will this need to be changed and how will the classes be determined?

Answer: This practice will in all probability need to change in order to be in compliance with the non-discrimination provisions of the Act. We expect more guidance to be provided on the non-discrimination provisions, and will be able to better able to determine how it is to be applied at that time.

Question: My question is on how different groups get different benefit contributions for the same health plan (same deductible, co-pay, etc).

> Example:
> Supt gets 100% family insurance.
> Other admin get 85% family insurance.
> Teachers get 90% of single plan paid for (married +one gets 90% of single plus $100 towards premium, teacher with family insurance gets 90% single premium plus $200 contributed).
> Classified staff receive $225 towards insurance.
>
> Is this legal under Obama-Care?

Answer: The non-discrimination provisions of the Act appear to require that for all employees, the amount of contribution and the quality of the coverage may not be more favorable for "highly compensated employees" than for other employees, excluding those in collective bargaining agreements. As noted earlier, we do not yet have guidance as to how the non-discrimination provisions are to be applied. Once regulations or other administrative guidance as to the applicability are provided, it is anticipated that time will be allowed for any changes needed to be implemented.

Question: Our health care plan is the same for ALL employees. Our administrative team has the entire premium paid by the Board. The remainder of our staff either has an ENTIRE FULL SINGLE PREMIUM OR 1/2 OF THE FAMILY paid by the Board (Both of these $ amounts are less than what is being paid for administrators). If we make absolutely NO CHANGES to our policy, is this still acceptable? Or does the entire $$$$$ amount have to be exactly the same for ALL EMPLOYEES? If we make ANY CHANGES to our policy...what happens to the premium contributions?...do they then have to be the same for all employees?

Answer: The answer to this question is the same as that above. The non-discrimination provisions of the Act appear to require that for all employees, the amount of contribution and the quality of the coverage may not be more favorable for "highly compensated employees" than for other employees, excluding those in collective bargaining agreements. As noted earlier, we do not yet have guidance as to how the non-discrimination provisions are to be applied. Once regulations or other administrative guidance as to the applicability are provided, it is anticipated that time will be allowed for any changes needed to be implemented.

Question: We currently offer insurance to contracted employees that work at least 20 hours per week. I understand that we can offer this benefit, since it is better than the 30 hour eligibility requirement. However, I'm wondering if this could cause a discrimination problem for us after July 1, 2014.

Answer: Offering coverage to employees working at least 20 hours per week is, as you note, more inclusive than required under the Act, and doing so does not run afoul of any shared responsibility provisions. As you note, thought, whether this may cause any problem under the nondiscrimination provisions is another issue. While we don't know just what type of guidance will eventually be provided, it appears that what will be focused on are the contribution by the employer to each individual, and the coverage offered. That's a little ambiguous, but it's really just not clear what the requirements will be under nondiscrimination.

Question: When we calculate substitute (or bus driver, etc.) hours during the measurement period, will we have to offer them insurance during the ensuing stability period if they average over 20 hours per week? This could be a budget issue for us.

Answer: How to deal with substitute teachers, bus drivers, coaches, etc., is the very subject of specific questions that have been submitted on behalf of educators to the IRS as it finalizes guidance in the form of regulations. As of now, however, there is not an exception for these types of employees from the general requirement that their hours be added on a monthly basis and the calculation for "full-time" be done. Until we have clarification on that, you may want to plan for the contingency that it will be necessary to treat their hours that way.

Question: Another school said that they have different definitions of full-time employee for teachers (20 hours/week) and other staff (30 hours/week). Will this still be permitted?

Answer: Under the Act, the threshold for being considered a "full-time" employee is 30 hours per week. I believe that regardless of an employer's alternative definition of "full-time," for shared responsibility purpose it is that 30-hour standard that will be applied. As far as nondiscrimination provisions, although we don't yet know the scope of the guidance that will ultimately be handed down, this may cause an issue if the result is to offer a lesser level or contribution of coverage to certain employees.

Question: We have a teacher that works 20 hours per week (teaching). She also has an extra-curricular assignment as a club sponsor. Do we have to keep track of her hours as a club sponsor and add them to her teaching hours to determine if she averages over 30 hours between the two assignments?

Answer: As of right now, until and unless additional guidance is provided regarding some of these unique situations schools face, if the additional hours of service by the employee are done in the capacity of an "employee" (which the Act defines as "an individual who is an employee under the common-law standard") it appears his or her hours in that extra-curricular assignment will need to be included in calculating whether he or she is a full-time employee of the employer.