



# Strategic Implementation of Employer Shared Responsibility Rules & 2014 Planning Considerations

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# Your Presenters

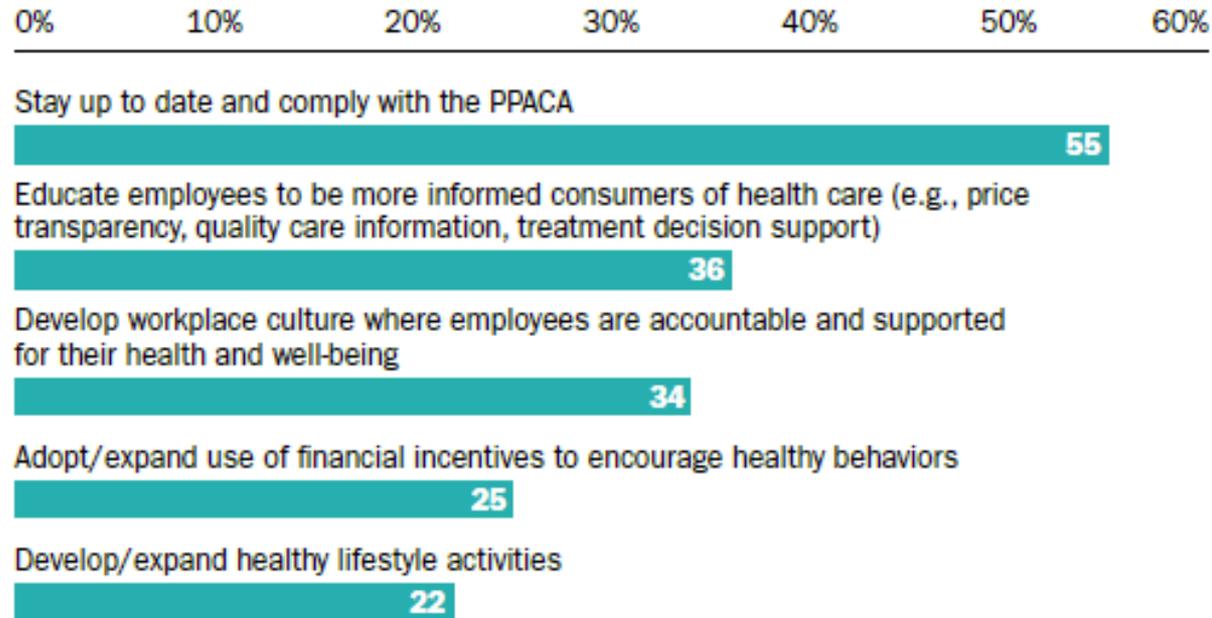
- Scott Newsom: Partner, Shumaker, Loop & Kendrick, LLP
- Bruce Davis: Principal, Leader of Findley Davies' Health/Group Benefits Consulting Practice
- Scott Hamner: Principal, Head of Technical Resources, Findley Davies

# Agenda

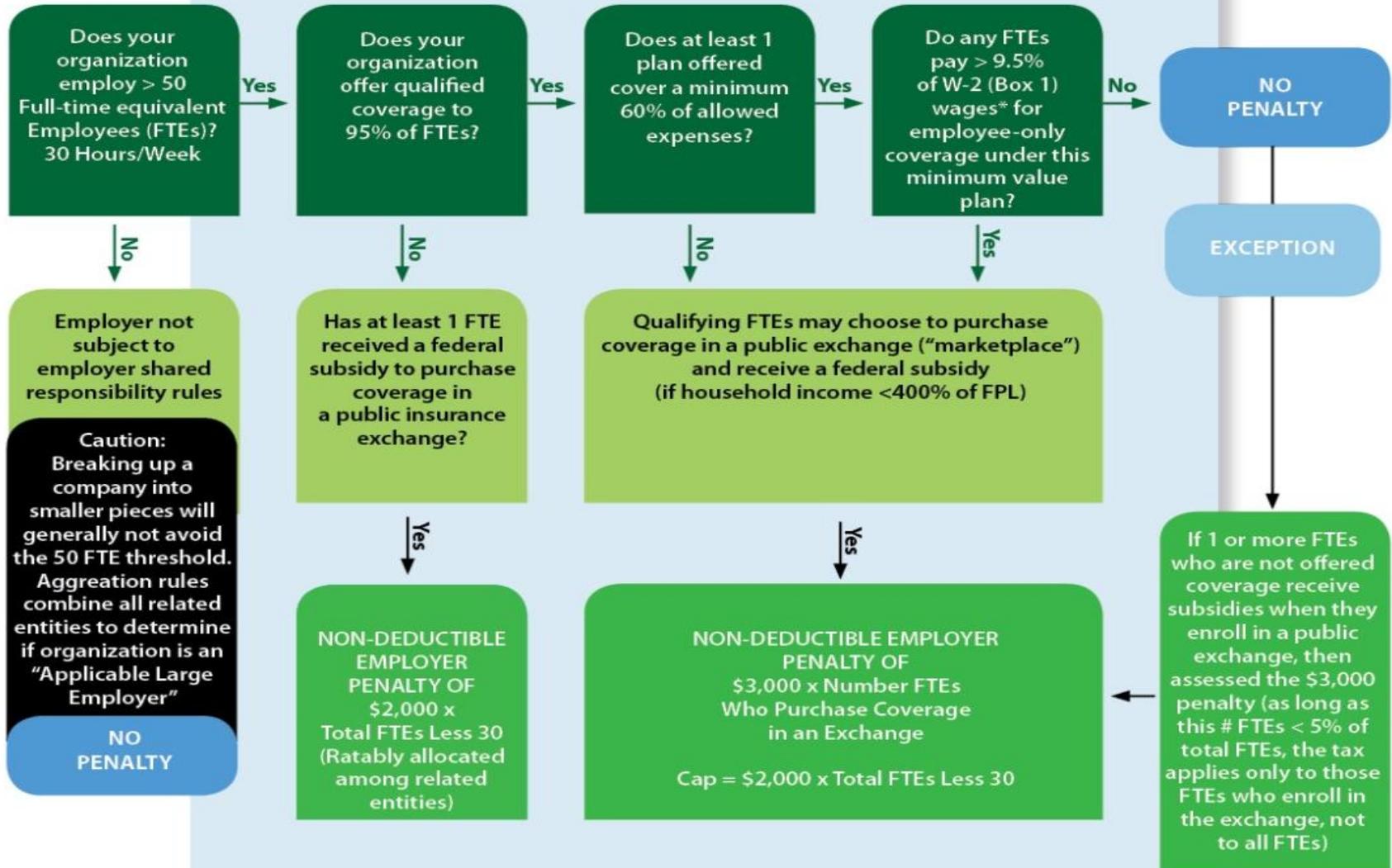
- Welcome
- Overview of the Employer Shared Responsibility Rules
  - Impact on Corporate Structure
  - Time Line Examples to Demonstrate Application of Measurement, Administrative & Stability Periods
- ACA Update & 2014 Planning Considerations
- Recap of Proposed Wellness Rules
- Questions & Answers

# Top Focus Areas of Employers' Health Care Strategy-2013

Source: NBGH/TowersWatson



# Employer Shared Responsibility Rules-2014



\* 2 other Safe Harbors for affordable coverage: 9.5% x Rate of Pay x 130 hours or 9.5% x Individual Federal Poverty Level (\$11,490 in 2013)

## What is an Applicable Large Employer?

- Do you have more than 50 full-time equivalent employees?
- Does breaking up my company into smaller pieces help me avoid the 50 FTE threshold?
  - Aggregation rules combine all related entities to determine if an employer is an Applicable Large Employer

## Who is The Employer?

- What if I outsource my employees to a staffing/employee leasing organization?
- Beware of anti-abuse rules



## Two Potential Penalties Under 4980H

- 1<sup>st</sup> penalty tax is assessed for failing to offer minimum essential health coverage to at least 95% of your full-time employees (FTEs) and their dependents
- 2<sup>nd</sup> penalty tax is assessed when coverage offered does not meet minimum value test (must cover at least 60% of allowable expenses) and/or employee contributions charged for single FTE coverage is unaffordable (i.e. exceeds 9.5% of employee's household income)
- Both penalties are not tax-deductible

## Key Points on Minimum Value Test

- May use HHS' MV Calculator; or
- “Safe Harbor” Plan to be created by IRS and HHS
  - Contemplating 3 plan designs, one being:
    - ✓ \$3,500 integrated Medical/Rx deductible; 80% in-network coinsurance; \$6,000 maximum OPM; or
- Actuarial Certification
- Only Tobacco-related wellness incentives enhance the value of the employer-provided plan
- Employer HSA contributions also enhance the value and so do HRA contributions, but only if they reduce employee cost-sharing for covered medical expenses

## Penalty for Not Offering Coverage

- 1<sup>st</sup> penalty is \$2,000 X # actual FTEs minus 30 X 1/12 for each month health coverage was not offered
  - Assessed only if FTE receives a premium subsidy to purchase coverage through the exchange or “marketplace”
  - If employee was offered coverage, but declined, their waiver will not trigger a penalty even if they enroll on the exchange
  - “Dependents” does not include spouses

# Penalty for Not Offering Coverage

- The 30 employee reduction for purposes of calculating the penalty is allocated ratably across all entities
- Any penalties are imposed separately upon each entity comprising an applicable large employer



# Failure to Offer Health Coverage Safe Harbor

- Provided employer offers coverage to at least 95% of its full-time employees, then 1<sup>st</sup> penalty tax is not triggered
- Failure to offer coverage is not required to be inadvertent; strategic exclusions may be considered

## A New Wrinkle on the 2<sup>nd</sup> Penalty Tax

- If one or more FTEs who are not offered coverage receive federal premium subsidies when they enroll in the exchange, then you are assessed the 2<sup>nd</sup> penalty tax
  - As long as this number of FTEs is less than 5% of your total FTEs, the tax (\$3,000) applies only to the employees who enroll on the exchange—not to all your FTEs

## More on the Definition of Dependent

- See IRC Section 152 (f)(1)
  - Children who are under age 26, including foster children
  - Employers have until 2015 to modify their plan documents to meet this expanded definition, but are expected to comply in 2014 as new employees are enrolled and employees participate in open enrollment
  - Remember, for purposes of 4980H, “dependents” does not include spouses

## Penalty if Coverage is Unaffordable

- 2<sup>nd</sup> penalty is \$3,000 X actual # FTEs who receive a federal premium subsidy X 1/12 for each month health coverage is not affordable
- There are 3 safe harbors regarding affordable coverage for the single FTE
- Only one employer-offered plan must satisfy the minimum value and affordability requirements

## Approved Safe Harbors

If any of these safe harbors are satisfied, you will not be subject to a penalty tax for unaffordable coverage:

- W-2 Safe Harbor: FTE employee contribution for single coverage does not exceed 9.5% of employee's W-2 wages (Box 1)
- Rate of Pay Safe Harbor: FTE's hourly rate X 130 hours does not exceed 9.5% of this computed monthly wage
- Federal Poverty Line Safe Harbor: FTE's contribution does not exceed 9.5% of the FPL for an individual (\$11,490)

## Who is a Full-time Employee?

- The employee averages at least 30 hours/week during a calendar month; or at least 130 hours/month
- Include hours actually worked plus hours for which the employee is entitled to pay because of sick leave, holiday, vacation, military duty, etc.

## What is a Variable Hour Employee?

- If you can't determine on their hire date whether the person will work at least 30 hours/week, the person is considered a "variable hour employee"
- If you expect the person to work at least 30 hours/week, but their employment is of limited duration, they may also be considered a "variable hour employee"
  - Available under Transition Rule through 2014

## What About Seasonal Employees?

- For now, “seasonal” remains undefined
- For 2014, use “reasonable, good faith interpretation” of the term “seasonal employee”
- For 2015, expect the IRS to define “seasonal employee” as someone who works less than x months (and perhaps other factors)
- More on seasonal employees later when we discuss Termination and Re-Hire

## Use of Measurement, Administrative & Stability Periods

- This process is optional for the employer
  - However, employers will want to take advantage of this guidance as a safe harbor in dealing with DOL/HHS/IRS
- Each entity within an Applicable Large Employer may use its own Measurement, Administrative & Stability periods
  - May use different periods for different categories of employees (e.g. union employees)
  - Must be administered uniformly and consistently for all employees in the same category

## Refresher on the Ground Rules

- Measurement Period must be at least 3 months and no more than 12 months
- Duration of the Stability Period may not be less than the duration of the Measurement Period, except:
  - If variable hour employee is determined to be FTE, Stability Period must be at least 6 months
- Administrative Period can not exceed 90 days and is included in the overlapping Stability Period

## Transitioning from 2013 to 2014

- If you want to use a Stability Period of 1/1/2014-12/31/2014, then use a Measurement Period that:
  - Is not less than 6 months long
  - Begins no later than 7/1/2013
  - Ends no earlier than 90 days before 1/1/2014
  - For example, Measurement Period can start 4/1/2013 and Administrative Period can start 10/1/2013

## Fiscal Year Plans (such as 7/1-6/30)

- If you maintained a fiscal year plan on 12/27/2012, you are subject to this transition rule:
  - Your Plan is not subject to 4980H Employer Shared Responsibility Rules (relating to penalties for failing to offer affordable, minimum value coverage to FTEs) until the 1<sup>st</sup> day of the plan year that commences in 2014 (i.e. 7/1/2014)
  - However, you will still be required to comply with tax reporting requirements under IRC 6056 beginning 1/1/2014
  - You must notify IRS in 2015 of your employees that were covered by qualifying coverage for each month of the preceding calendar year (1/1-12/31/2014)

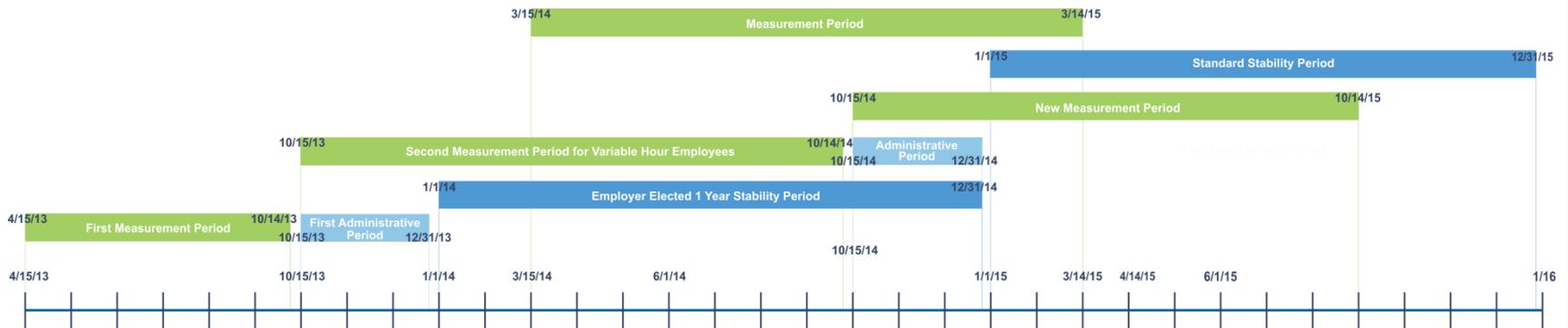
# Time Line Examples

- Assumptions:
  - 1<sup>st</sup> Measurement Period: 4/1/2013-9/30/2013
  - 1<sup>st</sup> Administrative Period: 10/1/2013-12/31/2013
  - 1<sup>st</sup> Stability Period: 1/1/2014-12/31/2014 (allowed with proposed Transition Rule)
  - SMP: 10/1-9/30
  - SAP: 10/1-12/31
  - SSP: 1/1-12/31
  - IMP for new variable hour employees is 1 year
  - IAP is 1 month

## Time Line Examples

- Our Hypothetical Examples will include:
  - Current ongoing FTE A
  - Current ongoing variable hour employee B
  - New FTE C
  - New variable hour employee D
  - New seasonal employee E



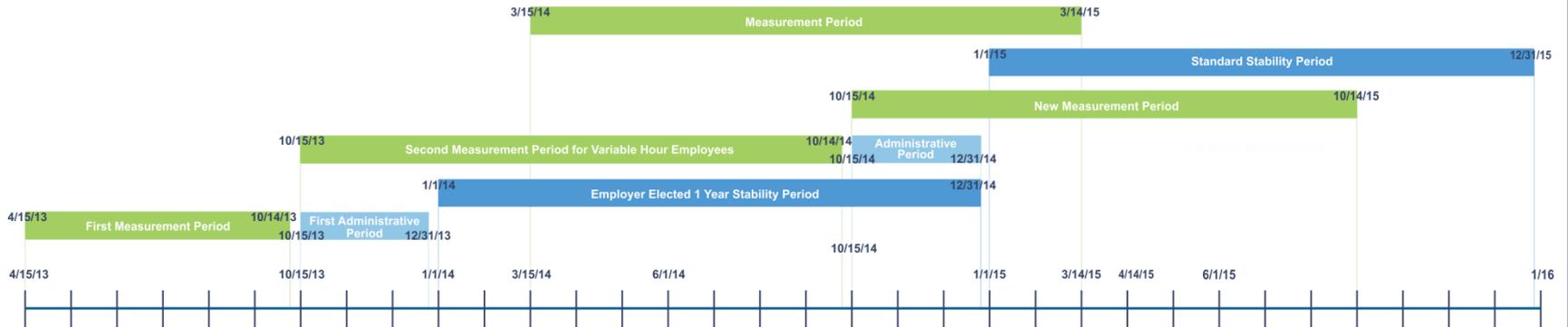


### Who am I?

I am a current ongoing employee who regularly works 40 hours per week. My employer can reasonably determine that I will satisfy the 30 hours of service per week average threshold.

### How does this affect me?

My employer must offer me (and my dependents) health coverage beginning on January 1, 2014.



## Who am I?



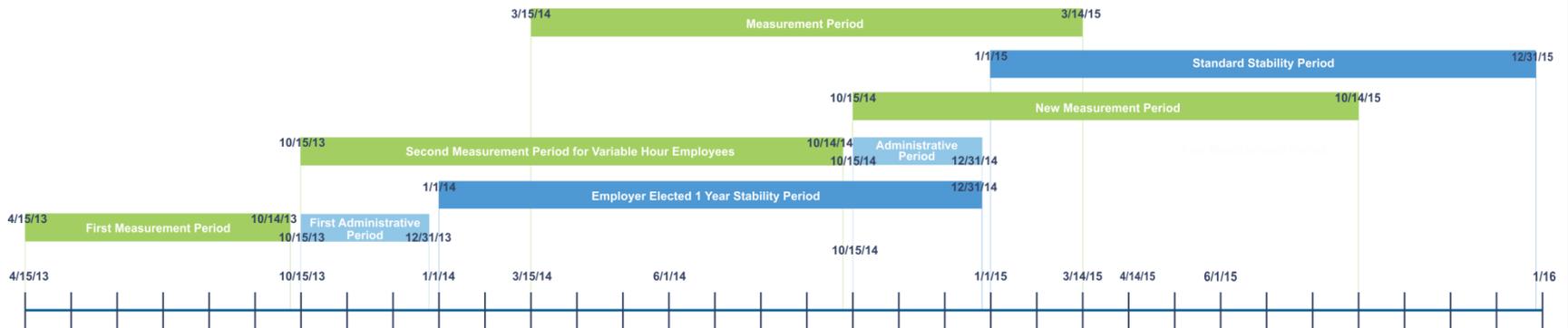
I am a current hourly employee who works approximately 25 hours per week. I am called a “Variable Hour Employee” under the Regulations.

## How does this affect me?

My employer tracks my hours of service over the First Measurement Period.

I worked only an average of 26 hours per week during the First Measurement Period.

I missed it.

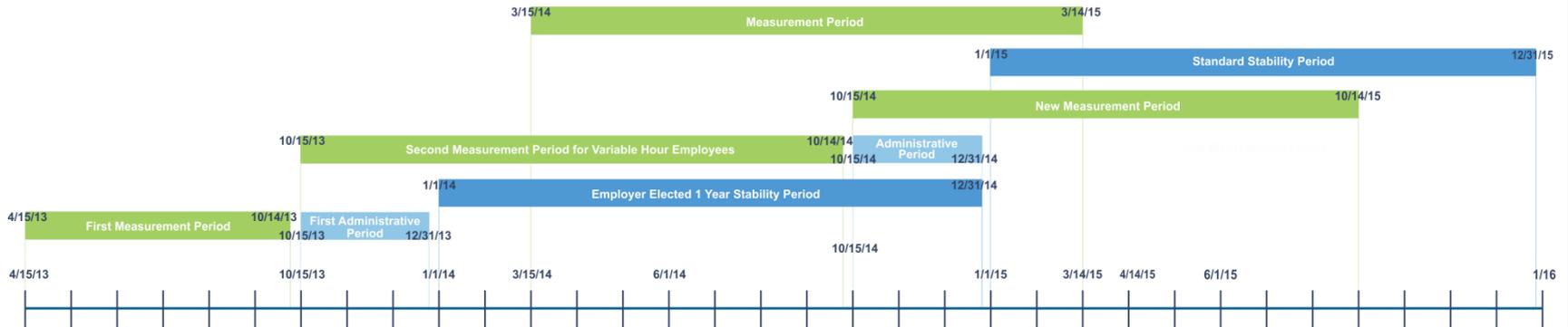


Who am I?

I am a new full-time employee. I started work today (March 15, 2014).

How does this affect me?

My Employer can reasonably determine that I will work on average 40 hours per week. My employer has until June 30, 2014 to offer me coverage (and my dependents) and enroll me (if I want coverage) to avoid a penalty tax.



## Who am I?

I started work today (March 15, 2014). My employer can't reasonably determine that I will work an average of 30 hours a week or more.

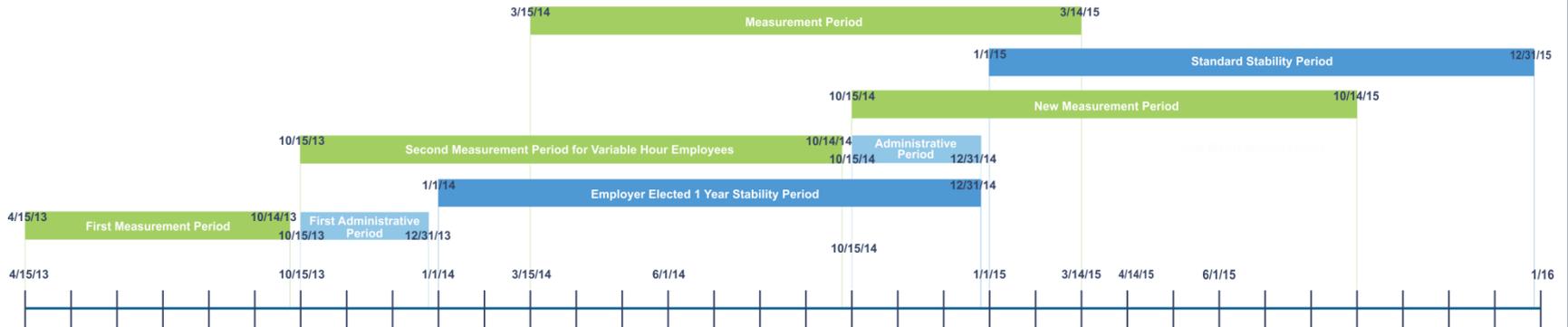
## How does this affect me?

My Employer measures my hours over the Initial Measurement Period (Ending March 14, 2015).

If I work less than an average of 30 hours per week, then my Employer does not need to offer health coverage for the Initial Stability Period.

If I work more than an average of 30 hours per week, then my Employer must offer health coverage for the Initial Stability Period (Ending April 14, 2016) assuming a short administrative period of 30 days.

What happens to me on January 1, 2016 (If I work less an 30 hours per week on average) or April 15, 2016 (If I work more than 30 hours per week on average) is determined by my first full standard Measurement Period ( October 1, 2014 through September 30, 2015).



### Who am I?

I am a new Seasonal Employee hired on June 1, 2014 and I am working through September. I will be rehired in June of 2015.

### How does this affect me?

Since I am a “Seasonal” Employee, my Employer knows I am going to terminate in September, and can reasonably determine that I am unlikely to average over 30 hours per week over the 12 month measurement period.

Since it is more than 26 weeks since my last hour worked for the Employer, when I am rehired on June 1, 2015, my Employer can treat me as a new Seasonal Employee and disregard my former hours of work.

## What Happens in the Event of Termination and Re-Hire?

- Person is treated as new employee under 2 conditions:
  - 1<sup>st</sup>, they did not have an hour of service for the employer for at least 26 consecutive weeks immediately preceding date of re-hire; or

# What Happens in the Event of Termination and Re-Hire?

- Employer uses the optional “Rule of Parity”
  - Person did not have an hour of service during period that is at least 4 consecutive weeks and exceeds the employee’s period of employment that immediately preceded date of termination

# Special Considerations

# Salaried/Exempt Employees Working Part-Time

- For non-hourly employees, use days worked (8 hours/day) or weeks worked (40 hours) equivalency methods
- Under no circumstances may these methods be used if doing so would understate amount of hours non-hourly employee worked

# Seasonal Employees

- 12-month IMP
  - IAP of 30 days (an AP may be up to 90 days, but together the IMP and the IAP may not exceed 13 months)
  - Seasonal Employee (using good faith interpretation of that term in 2014) may work any amount of hours during the 1<sup>st</sup> 6 months of their IMP (which commences on their DOH or by the 1<sup>st</sup> day of the month following DOH)
  - Terminates employment at the end of 6 months

## Seasonal Employees (cont'd)

- If Seasonal Employee's absence before re-hire is at least 26 weeks, employer may treat this person as new Seasonal Employee upon re-employment
  - May disregard their prior hours of service; and
  - May require commencement of new IMP upon re-hire
- As long as Employer cannot reasonably determine they will exceed 30 hours/week during IMP

# Adjunct Faculty & Other Unique Work Schedules

- Some employees, such as Adjunct Faculty, are not easily measured under current rules
- Proposed rules acknowledge this issue and provide some direction
- Employers must use a “reasonable method for crediting hours” consistent with 4980H
- Not reasonable to “take into account only classroom time or other instruction time” for instructors and adjunct faculty, disregarding other necessary time, such as class preparation time

## Teachers & Substitute Teachers

- Employees of an educational organization may have employment break periods that impact hours of service measurement
- To ensure accurate measurement, the organization must:
  - Exclude the employment break when calculating hours during the measurement period; or
  - Credit employee with hours during break at a rate = his/her average hours during measurement period that is not part of the break

## Student Workers

- Some receive task-based stipends connected to a project; others receive grants in connection to chemistry, biology or engineering programs
- Exemptions under FLSA – 4980H impact

# Hospitals

- Many hospitals use per diem or as-needed nurses and other personnel to work difficult-to-fill shifts or to help in peak occupancy situations
- In most cases, benefits are not extended to these per diem employees, even though some may average more than 30 hours/week

## Hospitals (cont'd)

- Hospitals may consider using 5% safe harbor for the 1<sup>st</sup> penalty tax to identify small core group of per diem employees to continue working their shifts as before
  - Their hours are not reduced; thus staffing needs are met and patient satisfaction upheld
  - Health benefits are not offered
  - If one or more of these per diem employees goes to the exchange and receives a subsidy, the penalty is limited to \$3,000/person

# COBRA

- If employer coverage ends, COBRA rights still apply
- Has the employment relationship ended?
  - If not, employee is still counted as FTE for the remainder of the stability period for purposes of 4980H taxes
  - If employee is paying full COBRA costs, then coverage may not be affordable, which could result in a \$3,000 penalty if that employee applies for and receives a federal premium subsidy through the exchange

# ACA Highlights for 2013

- Excise tax due for the new Patient-Centered Outcomes Research Institute
  - Funds comparative effectiveness research
  - \$1/member (employee/spouse/child) for the 2012 plan year
    - ✓ Due 7/31/2013
    - ✓ Use IRS Form 720 to remit the tax
    - ✓ As an excise tax, it's not tax deductible
  - \$2/member for the 2013 Plan Year
    - ✓ Due 7/31/2014

# ACA Highlights for 2013

- Employers will notify all employees about the availability of a health insurance exchange (“marketplace”) in their state
  - Effective date delayed until “late summer or early fall”
  - Public Exchanges will begin enrolling individuals and small groups (< 50 EEs) on 10/1/2013
    - ✓ In Ohio HHS will operate the exchange
  - Consider release of proactive employee communications in advance of this required notice

# ACA Highlights for 2014

- **New Individual Mandate**
  - Must be covered under employer's plan; buy individual insurance (in or outside the exchange); or pay a tax (greater of \$95 per person or 1% of household income)
- **Employer Shared Responsibility Requirements for Large Employers under IRC Section 4980H**
  - Assume on-demand reports to exchange, substantiating:
    - ✓ Employee eligibility for your plan (document waivers)
    - ✓ Hours worked in determining FTE qualification
- **New Wellness rules allow incentives to increase from 20% to 30% of cost of single coverage**

## How do the Premium Subsidies Work?

- Premium subsidies available to enrollees with household income from 100% to 400% of FPL who do not qualify for Medicare or Medicaid and who do not have employer-sponsored coverage meeting minimum value and affordability standards
- Premium subsidies come in the form of advance tax credits
  - Enrollees Pay lower premium up front
  - Tax credit taken in the following year

# How Do Cost-Sharing Subsidies Work?

- Cost sharing subsidies available to Silver Plan enrollees with household income up to 250% FPL
- Cost sharing subsidies coordinated between the health plan and the federal government, with monthly advance payments made to plans that are reconciled at year's end
  - Similar to low-income subsidies CMS (the Centers for Medicare and Medicaid) provides for Medicare Part D (Rx) program

# ACA Highlights for 2014

- Employers will pay annual Transitional Reinsurance Program fee of \$63/member
  - Established in each state to help stabilize premiums for individual exchange coverage
  - Not an excise tax; it's tax deductible
  - Fee will be assessed for 3 years
  - Post-65 retiree coverage excluded along with HIPAA-excepted benefits; includes COBRA
  - State may not levy an additional fee on self-insured plans subject to ERISA
  - TPA may pay this fee and invoice self-funded employer

## 2014: Excise Tax on Insured Plans

- For Tax Years On or After 1/1/2014
- Insurers pay excise tax based on net health insurance premiums written in preceding calendar year
- Some carriers estimate tax is 2.4% or more of premiums
- Check with your insurer on how this tax will be paid
  - One carrier indicated, “none of the taxes and fees are included in the renewal rates, but will be billed on the group’s monthly invoices”

# ACA Highlights for 2015-2018

- 2015: Non-grandfathered plans required to limit cost sharing on essential health benefits (Medical & Rx combined) to same out-of-pocket maximum that applies to High Deductible Health Plans
  - \$6,350 single/\$12,700 family in 2014; 2015 limits will be inflation-adjusted
  - 2014 “transitional year;” annual OPMs may apply separately to Medical TPA and PBM

# ACA Highlights for 2015-2018

- 2015: New reporting requirements under IRC Section 6056 (no guidance issued yet)
  - For periods beginning after 12/31/2013 must file an annual information return to:
    - ✓ Disclose #FTEs each month
    - ✓ Certify coverage:
      - ✓ offered to 95% or more FTEs; and
      - ✓ at least 1 plan offered meets minimum value test
    - ✓ Disclose monthly premiums for lowest cost option (i.e. employee contributions are affordable)
  - No later than 1/31 of each year, must furnish each FTE written statement containing information similar to that reported on the Code Section 6056 return

# ACA Highlights for 2015-2018

- 2018: 40% excise tax on “Cadillac Plans”
  - Assessed on value exceeding \$10,200 Single or \$27,500 Family



# 2014 Planning Considerations

- Opportunity to evaluate dependent subsidies and re-establish cost sharing objectives
  - Not required to offer coverage to spouses
  - Not required to contribute towards cost of covering spouses or children
  - Affordability requirements apply only to Single FTEs-not to FTE-Families or to PTEs
- Determine to what extent health benefit-eligible FTEs who have waived coverage will come back
  - Don't know what other employer plan sponsors will do in response to the ACA
  - We expect, on average, 25%-33% of waivers to enroll in their employer's plan

# Planning Considerations for 2014

- Consider offering a minimum value or “Bronze” plan
- Consider moving to a Core/Buy-Up structure
  - Employees can buy-up (or down) and pay the difference in cost between the Core and Buy-up plan
  - Your net cost remains same under either Core or Buy-up
  - Supports a Defined Contribution structure

# Proposed Wellness Rules

- Proposed Rules issued by **Employee Benefits Security Administration (EBSA)** November 26, 2012
- Proposed amendments, consistent with ACA, for nondiscriminatory wellness programs in group health coverage
- Clarified elements of the 2006 HIPAA nondiscrimination and wellness provisions
- Public comments were due January 25, 2013
- Proposed rules apply to both grandfathered and non-grandfathered plans

# Five Wellness Requirements

| Requirement   | Original                          | Proposed                      |
|---|-----------------------------------|-------------------------------|
| Frequency of opportunity to qualify                       | Once per year                     | Same                          |
| Size of reward  | 20%                               | 30%/50% for tobacco           |
| Uniform availability and reasonable alternative standards | Same full award must be available | Same with clarification       |
| Reasonable design   | Promote health or prevent disease | Same with clarification       |
| Notice of other means of qualification                    | Disclosure of availability        | Same with new sample language |

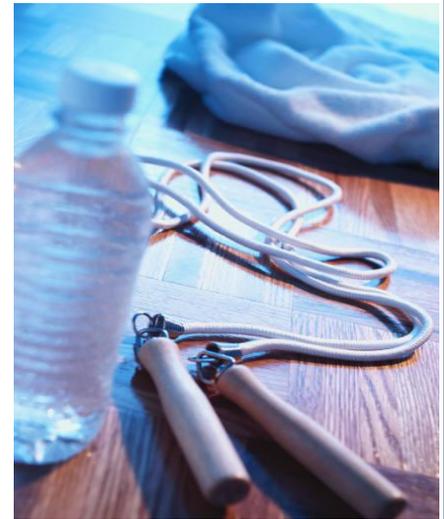
## Two categories of Wellness programs

- Participatory – not required to meet the requirements
  - Complete biometric screening and HRA
  - Fitness center reimbursement
  - Rewards for health challenges
- Health contingent – required to meet 5 requirements
  - Premium surcharge based on tobacco use
  - Rewards for meeting specific BMI, cholesterol, blood pressure and glucose levels
  - Requiring those who don't meet standards to complete a program



## Size of Reward

- Health-contingent wellness rewards increase to 30% of the cost of health coverage
- 50% for programs designed to prevent or reduce tobacco use
- Total cost of employee-only coverage or,
- If spouse or dependents may participate, the total cost of the respective coverage



## Reasonable Alternatives

- Under proposed rules, individuals would not have to improve their health to earn a reward, even if achieving the goal would not be unreasonably difficult



# Reasonable Design

- Programs must be reasonably designed to promote health or prevent disease
- Not be overly burdensome
- Not be a subterfuge for discrimination based on a health factor
- Not be highly suspect in method
- Comments invited on how to effectively target wellness programs so not a one-size-fits-all approach

## Questions & Answers

Presentation slides, an audio recording and Q&A transcript can be found on the Findley Davies website, [www.findleydavies.com](http://www.findleydavies.com) (Resource Center, Seminars) or [www.slk-law.com](http://www.slk-law.com).

# Thank You

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