Patient Protection and Affordable Care Act: 2015 Update

Steve Darden, Esq.
(423) 283-6303
sdarden@hsdlaw.com
www.hsdlaw.com

Hunter Smith & Davis LLP

Labor & Employment Team

William C. Bovender	(423) 378-8858
Stephen M. Darden	(423) 283-6303
Michael A. Eastridge	(423) 283-6313
Michael L. Forrester	(423) 378-8836
Gregory K. Haden	(423) 378-8830
Joseph B. Harvey	(423) 378-8854
Michael S. Lattier	(423) 378-8838
Christopher D. Owens	(423) 283-6312

PPACA (Passed March 2010) Survives Legal Challenge (June 2012) To Mandate That Most U.S. Citizens Must Purchase Health Insurance

The Commerce Clause and Constitutionality . . .
It's a Tax!!!

2012 U.S. Supreme Court Decision Upholds PPACA

- *National Federation of Independent Business, et al. v. Sebelius, Secretary of Health and Human Services, et al*.
- Decision issued June 28, 2012
- Outcomes:
  - All of Title I upheld under Congress' taxation authority
  - Not a valid enactment under Commerce Clause
  - Medicaid expansion limited as unconstitutionally coercive of states

Chief Justice John Roberts quoted in *NFIB vs. Sebelius*:

"[E]very reasonable construction must be resorted to, in order to save a statute from unconstitutionality."
Hooper v. California, 155 U.S. 648, 657 (U.S. 1895)

Litigating ACA Provisions: Contraceptive Services

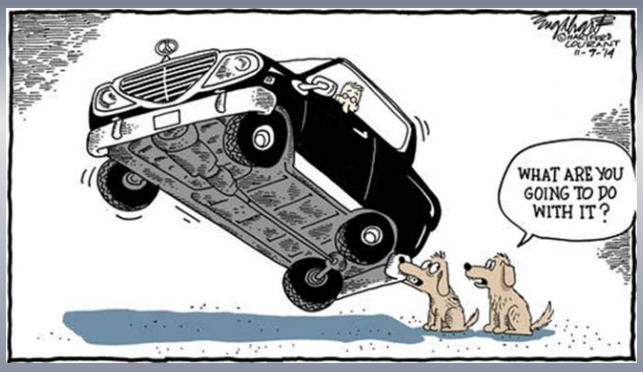
- *Hobby Lobby Stores, Inc. v. Sebelius*
- **Issue**: Are corporations persons for purposes of the Religious Freedom Restoration Act (RFRA) and do Free Exercise rights extend to some for-profit organizations, namely those that run their businesses based on religious principles?
- The Supreme Court says "yes."

Litigating ACA Provisions: Individual Marketplace Subsidies

- *King v. Burwell* (decision expected June 2015)
- Claim is that PPACA only authorizes tax subsidies to individuals in states that operate their own Exchanges and not to those who will get coverage through a federal Exchange.
- In contrast, IRS regulations provide for subsidies to be available to individuals enrolling through state or federal Exchanges.
- 8 Million people receive subsidies from federal Exchange.
- The key phrase: “through an Exchange established by the State.”

A Supreme Court Victory: Free at Last?

Or, Now What?



ACA's Two Main Objectives (#1)

#1 Improve coverage through reforms to the insurance market

- Modify current employer provided system
- Ensure individuals are not underinsured
- Emphasize preventive services to improve health

ACA's Two Main Objectives (#2)

#2 Expand the number of insured Americans by increasing access to coverage at an affordable price (57.5 million people uninsured at some point during 2012 – CDC)

- The goal is to be accomplished through:
  - Expansion of Medicaid
    - 12-16 Million covered by 2019
  - Health Insurance Marketplaces
    - 24-25 Million covered by 2019
    - Subsidies, Tax credits, and Penalties

Major Reform Concepts

1. Individual Purchase Mandate as of 2014. (Get coverage or pay a tax).
2. Employer Shared Responsibility mandate ("Pay or Play") will apply in ~~2014~~ 2015.
3. For employer plans, employee cost (individual) limited to 9.5% of "household", i.e. employee, income under least expensive employee only option
4. Penalties for individuals without coverage started in 2014
5. Exchanges. Individual policies may be purchased through health insurance marketplaces called "exchanges."
6. Premium transparency. Plans required to report proportion of premium $$ spent on clinical services, and provide rebates if amount is less than 85% (large plans) or 80% (small plans and individuals).

Major Health Care Reform Concepts (Continued)

7. Guaranteed issue and renewability of coverage. Restrictions on rescission of coverage.
8. Children stay insured under parents' plans until age 26.
9. Coverage cannot be denied to those with pre-existing conditions.
10. Lifetime limits on "essential health benefits" are prohibited and restrictive annual limits are only as permitted by DHHS.
11. New plans must provide certain preventive services without co-pays.
12. Nursing Mother proviso: Employer must provide "reasonable break time" and private space for purposes of expressing breast milk "each time" the employee needs to do so. "A place, other than a bathroom, that is shielded from view and free from intrusion from co-workers and the public." (Effective on March 23, 2010)

What Is It? Still a Matter of Opinion

- *"Putting us on a glide-path toward the competitive, patient-centered market of the future."*
  -- Dept. of Labor's description of grandfathering regulations
- "*The most sweeping change in domestic policy in a generation. It's big, and it's complicated."*
  -- Christian Science Monitor, March 22, 2010
- *"[S]imply a government give away program that requires no personal responsibility or accountability, per se."*
  -- Tennessee Senator Rusty Crowe, Johnson City Press, May 16, 2015

PPACA and ERISA Integrated

- ACA added one new provision:
  ERISA § 715
- ERISA § 715 incorporates all of ACA's coverage requirements
- What does this mean?
  - Employer sponsored health coverage (non-grandfathered) must comply with ACA
  - ERISA's remedial provisions (§§ 502 & 510) can be used to enforce ACA
  - Retaliation claims for dropped coverage?

ACA's Individual Mandate

- Beginning in 2014, all individuals are required to maintain health insurance for themselves and their dependents
- Individuals are required to maintain "**minimum essential coverage**" through
  - Employer coverage
  - Individual coverage
  - Self-funded student health plan coverage, or
  - Federal programs such as Medicare and Medicaid

Individual Mandate

- Annual penalty (assessed monthly) for not maintaining coverage is the greater of a flat-dollar penalty or a % of income penalty
- Annual flat-dollar penalty is halved for children under 18
- Annual flat-dollar penalty is capped at 3x the per-adult rate
- Annual % of income penalty capped at the national average of cost for Bronze Exchange coverage for the individual and dependents
  - % of income penalty designed to affect higher wage earners

	Per Adult	Per Child (<age 18)	Family Max	OR % of income
2014	$95	$47.50	$285	1%
2015	$325	$162.50	$975	2%
2016	$695	$347.50	$2,085	2.5%

Medicaid Expansion

- Medicaid to cover adults without dependent children up to 138 percent of Federal Poverty Level – **OPTIONAL FOR STATES**
- Starting in 2014, states that decide to expand Medicaid will cover all adults up to income limits of about **$16,000 a year for an individual and $32,500 per year for a family of four.**
- Insure Tennessee is a potential Tennessee compromise

"Coverage" of "Applicable Large Employers" Having At Least 100 Employees (FTEs) in 2015 And At Least 50 Employees (FTEs) in 2016

- Full and part time employees combined
- Full-time status based on 30 hours being full time work
- All part-timers' hours worked in a month aggregated and divided by 120 (30 X 4 = 120)
- Example: 20 part-time employees @ 96 hours per month = 1920 hours; 1920 hours ÷ 120 = 16 FTEs
- If covered, must offer minimum essential coverage to "substantially all" full time employees and their dependents, or subject to penalty

Employees Not Counted

- Owners
  - Sole proprietors
  - Partners in a partnership
  - Shareholders of an S corporation with over 2% ownership
- Leased employees
- Non-resident aliens whose service occurs outside the U.S.

Controlled Group Rules Apply

- The determination of large group employer status is made based on the IRS controlled group rules under IRC 414(b), (c), (m), (o)
- Types of controlled groups:
  - Parent-subsidiary groups – one business owns at least 80% of another business
  - Brother-sister groups – five or fewer individuals, estates or trusts together own at least 80% of each business; and the same individuals together own more than 50% of each business
  - Combined parent-subsidiary – each business is a member of either a parent-subsidiary or a brother-sister group; and at least one of the businesses is the common parent of a parent-subsidiary and is also a member of a brother-sister group

If Covered: Shared Responsibility Means the Employer Must "Play or Pay"

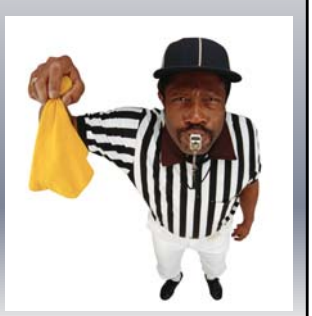
- Offer Minimum Essential Coverage
- To "substantially all" full-time employees and non-spousal dependents (70% in 2015; 95% in 2016)
- Or pay penalty

The “Employer Mandate” and Potential Penalties

If Employer Mandate applies, the Employer must either offer “affordable” minimum essential coverage to substantially all full time employees, or face a penalty.

There are two main penalties:

1. “No Coverage” and
2. “Unaffordable Coverage”



Possible Employer Response to Play or Pay: Workforce Realignment

- Employer mandate
  - Penalty determined based on “full-time” employees
  - ACA “full-time” eligible employees work at least 30 hours per week
- Reduce employees and/or hours?
- Cap the hours worked by “part-time” employees to under 30 hours?

“No Coverage” Penalty

Three step determination:

1. Employ 50 FTEs?

   If yes

2. Offer health care coverage to substantially all employees? (95%)

   If no

3. Did at least one FTE obtain coverage via the exchanges <u>and</u> receive an income-based tax credit from an exchange?

   If yes

Employer pays No Coverage penalty of $2,000 per year for each employee, excluding the first 30 FTEs

“Unaffordable Coverage” Penalty

Four step determination:

1. At least 50 FTEs?

   If yes

2. Offer health care coverage to substantially all FTEs? (95%)

   If yes

3. Did at least one FTE obtain coverage via the exchanges <u>and</u> receive an income-based tax credit from an exchange?

   If yes

4. Is the Employee’s cost for individual coverage (least expensive employee-only option*) greater than 9.5% of household income <u>or</u> does coverage fall below “minimum essential” standard?

   If yes

Employer pays Unaffordable Coverage penalty, the lesser of $3,000 per year for each FTE who actually uses an exchange or the “No Coverage” penalty amount.

* “Affordability” based on individual plan only, computed on employee’s pay.

Temporary, Seasonal and Variable Hour Employees

- 30 hours per week
- Look back and stability periods
- 120 day cap

Temporary Workers Through Staffing Company

- Joint Employer Issue
- Does the Staffing Company offer minimum essential coverage to its employees on affordable terms?
- Indemnification language
- 30% cap in 2015; 5% cap in 2016

Employer-Employee Labor Relations

Assessment of Workforce:

A. How important is employer-provided insurance?
B. Getting the most bang for the employer's buck (cost / benefit analysis of providing vs. not providing)
C. Employees' welfare
D. Spousal coverage
E. Employee expectations and mobility
F. Pay employees who choose not to accept coverage after it is offered them

PPACA: Provisions & Requirements

Travis McMurray

Provisions by Year

- 2010 (26 provisions, 26 in effect)
- 2011 (20 provisions, 18 in effect)
- 2012 (11 provisions, 10 in effect)
- 2013 (14 provisions, 13 in effect)
- 2015 (1 provision, 0 in effect)
- 2016 (1 provision, 0 in effect)
- 2018 (1 provision, 0 in effect)

Disclaimer

This material has a limited shelf-life

What Provisions are not in effect?

- 2011
  - Grants to establish wellness programs (small employers – funds have yet to be awarded due to budget debates)
  - Medicare independent payment advisory board (as of May 31, 2013, CMS determined not needed at this time)
- 2012
  - Medicaid Payment Demonstration Projects (funds not appropriated)
- 2013
  - Financial Disclosure (discloses financial relationships between health entities – delayed)

What Provisions are not in effect?

- 2014
  - Wellness Programs in Insurance (10 state pilot program)
- 2015
  - Increased Federal Match for Children's Health Insurance Program (slated to launch in October 2015)
- 2016
  - Health Care Choice Compacts (permits states to form health care choice compacts and allows insurers to sell policies in any participating state)
- 2018
  - Tax on High-Cost Insurance

ACA/Health Care and Education Reconciliation Act

- 2013 Provisions
  - Additional Medicare Tax of .9% (wages in excess of $200,000/$250,000): Form 8959
  - NII Tax of 3.8% ($200,000/$250,000): Form 8960
  - Itemized deduction threshold for medical expenses increased from 7.5% to 10% of AGI
  - FSA contributions for medical expenses limited to $2,500

ACA/Health Care and Education Reconciliation Act

- 2014 Provisions (Individual Mandate)
  - Penalty begins (phased-in)
    - 2014 $95/$285 (or 1% of income)
    - 2015 $325/$975 (or 2% of income)
    - 2016 $695/$2,085 (or 2.5% of income)
  - Premium assistance credit for individuals between 100% and 400% of federal poverty level
  - Form 1095-A (Health Insurance Marketplace Statement)
  - Form 8962 Premium Tax Credit
  - Form 8965 Exemptions

ACA/Health Care and Education Reconciliation Act

- Employer Mandate
  - 2015: Employer > 100 full-time employees
  - 2016: Employer with 50 to 99 full-time employees

Penalties for Employers (2015 & 2016)

- Did the employer have at least 100 (50 for 2016) full-time equivalent employees in the previous year?
  - No: Penalties do not apply to employers with fewer than 100 (50 for 2016) full-time employees
- Yes: Does the employer offer health insurance coverage to at least 70% (95% for 2016) of its full-time workers and their dependent children?
  - No: Did at least one full-time employee receive a premium tax credit or cost-sharing subsidy in the federal or state Marketplace?
    - No: There is no penalty payment required of the employer
    - Yes: The employer must pay a penalty for not offering coverage

Penalties for Employers (2015 & 2016)

- Yes: Does the insurance pay for at least 60% of the covered health care expenses (minimum value)?
  - No
    - Employees and their dependents can choose to buy coverage in a Marketplace and may apply for a premium tax credit and cost sharing subsidy
    - The employer must pay a penalty for not offering coverage that is affordable and provides minimum value

Penalties for Employers (2015 & 2016)

- Yes: Do any employees have to pay more than 9.5% of family income (or safe-harbor amount) for the employer coverage (called affordable coverage)?
  - No: There is no penalty payment required of the employer
  - Yes
    - Those employees and their dependents can choose to buy coverage in a Marketplace and may apply for a premium tax credit and cost sharing subsidy
    - The employer must pay a penalty for not offering coverage that is affordable and provides minimum value

Penalties for Employers

- Key Thresholds
  - Applicable Large Employers
    - 2015: 100 or more full-time equivalent employees
    - 2016 50 or more full-time equivalent employees
  - Offer Health Insurance Coverage
    - 2015: 70% of full-time employees
    - 2016: 95% of full-time employees
  - Minimum Value Requirement
    - Plan must pay, on average, at least 60% of the costs of covered services
  - Affordable Coverage
    - Premium for individual coverage cannot exceed 9.5% of his/her household income
    - Safe-harbor amounts (worker's wages, employee's rate of pay at the start of the coverage period, or the federal poverty level for a single individual

Full-Time Equivalent Employees

- Employees who work 30 or more hours per week
- Hours worked by part-time employees (less than 30 hours per week) are included
- Round down…49.9 FTEs = 49

Example: 40 full-time employees and 20 part-time employees who each work 24 hours per week (or 96 hours per month)

20 employees X 24 hours = 480

480/30 (FTE hours) = 16

Detailed Example: How to Calculate Full-time Equivalent

Employee	Annual Hours Worked	Limited to 2,080/employee	Cumulative Hours
John	2,080	2,080	2,080
Raymond	1,040	1,040	3,120
Beth	2,300	2,080	5,200
Tracy	400	400	5,600

Example (cont'd)

Calculation:

Total Hours	5,600
Full-Time Hours	2,080
FTE	2.69
FTE Rounded Down	**2**

Full-Time Equivalent Employees

- Special Considerations
  - Only employees working in the United States are counted
  - Volunteer workers for government and tax-exempt entities, such as firefighters and emergency responders, are not considered
  - Teachers and other education employees are considered full-time employees even if they don't work full-time year-round
  - Seasonal employees who typically work 120 days or less are not considered full-time employees
  - Owners are not considered
    - Sole proprietors
    - Partners in a partnership
    - Shareholders of an S corporation with over 2% ownership
  - Leased Employees are not considered

Affordable Coverage: Safe-Harbor Amounts

- W-2: employer can determine affordability by referring to an employee's wages (box 1 of Form W-2)
- Rate of Pay: benefits are affordable if monthly contributions for self-only coverage for the lowest cost plan are equal to or lower than 9.5% of employee's hourly rate of pay on the first day of the plan year, multiplied by 130 (30 X 52 / 12)

Example: Employee paid $15 per hour and lowest monthly premium is $150

$15 x 130 = $1,950

$1,950 X 9.5% = $185.25

Employer Penalties

- No Coverage
  - $2,000 per full-time employee, minus the first 30 employees (for 2015, minus the first 80 employees)
- Not Affordable (unaffordable)
  - Lesser of
    - No Coverage penalty, or
    - $3,000 for each employee who receives a subsidy
- Penalties are not deductible for income tax purposes and will be adjusted for inflation in future years

No Coverage Penalty

- Three step determination:
  - Meet the full-time equivalent employee requirement
  - Don't offer health care coverage to substantially all employees
  - Did at least one full-time equivalent employee obtain coverage via the exchanges and receive an income-based tax credit from an exchange?

No Coverage Penalty: Example

- 132 full-time employees
- 27 part-time employees average 24 hours per week
- No healthcare coverage is offered
- 3 full-time employees are enrolled and qualify for a subsidy from the Marketplace

2015 Penalty: 132 – 80 = 52; 52 X $2,000 = $104,000

2016 Penalty: 132 – 30 = 102; 102 X $2,000 = $204,000

Unaffordable Coverage Penalty

- Four step determination:
  - Meet the full-time equivalent employee requirement
  - Do offer health care coverage to substantially all employees
  - Did at least one full-time equivalent employee obtain coverage via the exchanges and receive an income-based tax credit from an exchange?
  - Is the employee's cost for individual coverage (least expensive employee-only option) greater than 9.5% of household income?

Unaffordable Coverage Penalty: Example

- Same 132 full-time employee base
- Healthcare coverage is offered
- 3 full-time employees do not meet the 9.5% of household income rule
- 2 of those full-time employees enroll for coverage through an Exchange

Lesser of:

2015 Penalty: 132 – 80 = 52; 52 X $2,000 = $104,000

2 employees X $3,000 = $6,000

	Not large employer: <100 full-time employees	Large employer: 100+ full-time employees (50+ for 2016)			
Coverage Offered	NA	No coverage offered: **A** No full-time employees receive credits for exchange coverage	No coverage offered: **B** 1 or more full-time employees receive credits for exchange coverage	Offers coverage: **C** No full-time employees receive credits for exchange coverage	Offers coverage: **D** 1 or more full-time employees receive credits for exchange coverage
Penalty	None	None	Number of full-time employees minus	None	Lesser of: # of full-time employees minus 30, multiplied by $2,000 OR # of full-time employees who receive credit for exchange coverage

Reporting Requirements

- W-2
  - Employers who issued at least 250 W-2s for proceeding year
  - Report the value of the applicable employer sponsored coverage in Box 12 (code DD)
- 1095-C: Employer-Provided Health Insurance Offer and Coverage
  - Applicable large employers
  - Issued to Employee by the Employer
  - Due to employees January 31st
- 1094-C: Transmittal of Employer-Provided Health Insurance Offer and Coverage Information Returns
  - Transmitted to the IRS along with all Forms 1095-C
  - Due to the IRS by February 28th

Reporting Requirements

- 1095-B: Health Coverage
  - Required regardless of number of employees
  - Reported by health insurance provider
  - Issued to employees by January 31st
- 1094-B: Transmittal of Health Coverage
  - Do to IRS by February 28th

Patient Protection and Affordable Care Act: 2015 Update

TYLER MACKIE
TMACKIE@THEMACKIEGROUP.NET
423-557-2849

PPACA: 2010- Present

- Health Plan Changes
  - Small Group and Individual plans-
    - Essential Health Benefits (EHB)
    - Annual Limits Removed (no cap on claims)
    - Pre-existing and Waiting periods no longer exist
    - Children can be covered until age 26
    - Preventative Coverage at 100%
    - Community rating (no more individual underwriting)
    - Metallic Rating of plan
    - Deductible and OOP Max Limits on Small Group plans
    - Exceptions

PPACA and The "Marketplace"

- FFM or Federally Facilitated Marketplace opened January 1st 2014
  - www.healthcare.gov vs. purchasing direct
  - Non-Grandfathered Non-ACA terminate on renewal
  - Subsidized premiums for certain income levels
  - Penalties for Individuals without coverage begin
  - Open Enrollment periods extended to May 15th, 2014
  - Enrollment opens again November 15th, 2014 for 1/1/15

Premium Subsidy Tables by Income

Table 1: Premium Subsidies, by Income in 2014 and 2015

Income % Poverty	Income Range in Dollars for the **2014** benefit year		Income Range in Dollars for the **2015** benefit year	
	Single Individual	Family of Four	Single Individual	Family of Four
Under 100%	Less than $11,490	Less than $23,550	Less than $11,670	Less than $23,850
100% - 133%	$11,490 - $15,282	$23,550 - $31,322	$11,670 - $15,521	$23,850 - $31,721
133% - 150%	$15,282 - $17,235	$31,322 - $35,325	$15,521 - $17,505	$31,721 - $35,775
150% - 200%	$17,235 - $22,980	$35,325 - $47,100	$17,505 - $23,340	$35,775 - $47,700
200% - 250%	$22,980 - $28,725	$47,100 - $58,875	$23,340 - $29,175	$47,700 - $59,625
250% - 300%	$28,725 - $34,470	$58,875 - $70,650	$29,175 - $35,010	$59,625 - $71,550
300% - 400%	$34,470 - $45,960	$70,650 - $94,200	$35,010 - $46,680	$71,550 - $95,400
Over 400%	More than $45,960	More than $94,200	More than $46,680	More than $95,400

NOTES: Alaska and Hawaii have different poverty guidelines. Note that tax credits for the 2015 benefit year are calculated using 2014 federal poverty guidelines, while tax credits for the 2014 benefit year are calculated using 2013 federal poverty guidelines.

SOURCE: Kaiser Family Foundation

Trends and Strategies

- Small Group plans (under 50 FTE's)
  - Many are dropping coverage and sending their employees to the "Marketplace"
  - Companies are paying minimum required, and not contributing to dependent coverage.
  - Plan design changes, and Community Rating
  - EHB required on Small Group Plans
  - Utilization of "Gap Plans" and raising the deductible
  - SHOP Plans and Self-Funded Plans
  - HSA's are less common due to lower deductible requirements
    - $2,000 for single, $4,000 for family
    - Max Out of Pocket: $6,450 for single, $12,900 for family

Trends and Strategies

- Intermediate and Large Group Plans
  - Transitional Relief for groups 50-99 until 2016*
  - Some plans with Blue Cross of Tennessee are offered exceptions until after October 1st 2015 renewal.
  - Transitional Relief allows them additional time before their group plan is required to fully offer Essential Health Benefits.
  - Companies are utilizing HRA's and HSA plans to buffer rate increases.
  - Many companies are adding MEC options, or Minimum Value Plans as a low cost option.
  - Companies can require Dependents to accept coverage from their employer if available

Closing Remarks

- What is on the Horizon
- Managing The Fear Factor
- Compliance and Reporting (SBC)
- Have a strategy, be creative
- Shop, Shop, Shop….

PPACA UPDATE 2015

THANK YOU