

# Political Update and Update On the Employer Mandate Final Rule

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# Political Landscape



**Washington's political dynamic is fractured**

**House actions are tempered by conservative pressure and tight Democratic majority in the Senate and President Obama**

**Demonstrating business impact extraordinarily important**



**States are dealing with a host of health reform issues**

**Exchanges**

**Medicaid Expansion**

**Budget Concerns**

**Lack of Information from the Federal Government**

**Extreme variances in attitudes about implementation including amongst branches of state government**

# Final Employer mandate rules

- On February 10, 2014, the federal Department of Treasury released the final rules on compliance with the employer shared responsibility requirements under the health reform law, which often referred to as the law's employer mandate provisions. <https://s3.amazonaws.com/public-inspection.federalregister.gov/2014-03082.pdf>
- The rules will generally take effect on January 1, 2015.
- The Department of Treasury also has a web page available offering more guidance on the rules and determining employer eligibility. <http://www.irs.gov/uac/Newsroom/Questions-and-Answers-on-Employer-Shared-Responsibility-Provisions-Under-the-Affordable-Care-Act>

# What's *New*

***The final rules provide a number of important changes from the proposed rules issued in December 2012. They also provide a great deal of transition relief for employers of all sizes who are subject to the mandate.***

# Major Changes We Will Discuss Today

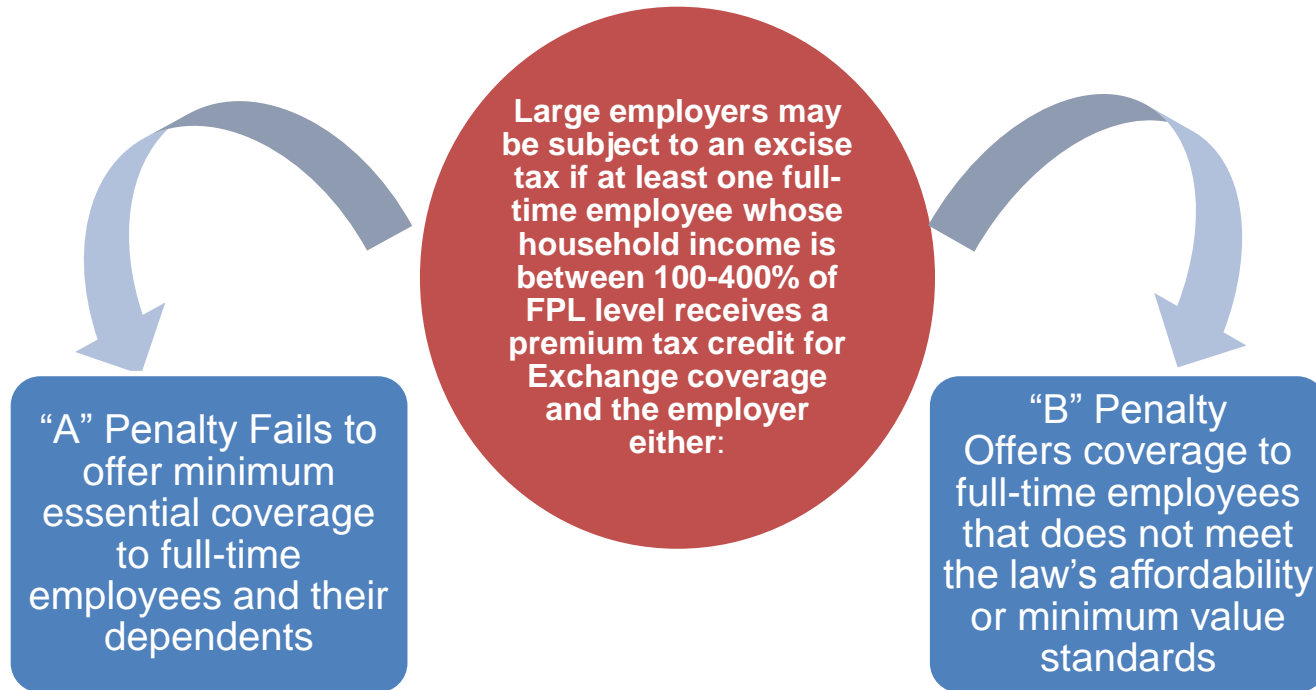
- ✓ Enforcement delay for most groups with 50-99 full-time equivalents
- ✓ Obligation clarity for employers with employees in a multiemployer plan
- ✓ Guidance on how to treat employees of staffing firms, PEOs, school faculty, student workers, people with on-call and layover hours, volunteers, clergy and other employees with tricky hourly calculations.
- ✓ Transition relief for:
  - ✓ Establishing a compliant plan by 2015
  - ✓ Non-calendar year plans
  - ✓ Covering 95% of your workforce
  - ✓ Coverage of Dependents
- ✓ Changes to the “rehire” calculation
- ✓ Changes to monthly measurement period options




The More Things Change,  
The More They Stay the Same

# Employer Mandate

## Basic Coverage Rules for Large Employers




# Rule on Minimum Essential Coverage



## Minimum Essential Coverage Includes:

- Insurance policies sold in the small or large group market
- Employer-sponsored group health plans (a group health plan is a welfare arrangement under ERISA that provides medical care to employees or dependents through insurance, reimbursement or otherwise)



## Minimum Essential Coverage Does Not Include:

- Stand-alone HRAs that are not integrated with a group health plan
- HIPAA-excepted benefits such as: stand-alone vision or dental, cancer-only policies, indemnity plans (hospital or disease), accident or disability plans, on-site medical clinics and other types of coverage listed in PHSA §2791(c)



# Coverage Tests

## Affordable

Employee's share of the premium cannot exceed 9.5% of household income.

Affordability test is based on the cheapest minimum value plan the employer offers.

HRA contributions under certain circumstances are factored into the affordability calculation.

Test is also based on the employee-only rate, regardless of whether or not the employee selects family or dependent coverage

Affordability test is based on family income but the final rule codifies wage-based safe harbors for employers.

## Minimum Value

Lowest tier plan must be at least a 60% actuarial value

Actuarial value is based on cost-sharing and out-of-pocket expenses, not premiums

Employer contributions to account-based plans will factor into actuarial value

Administration has a calculator and there are other safe harbors employer can use

Small groups that offer Bronze QHPs or higher meet the minimum value standard but there is no safe harbor for grandfathered plans, self-funded plans or "grandmothered" plans

# How Do The “A” and “B” Penalties Work?

Applicable employers can be penalized either for :

## The A Penalty

Failing to offer minimum essential coverage to enough full-time employees and their dependent children

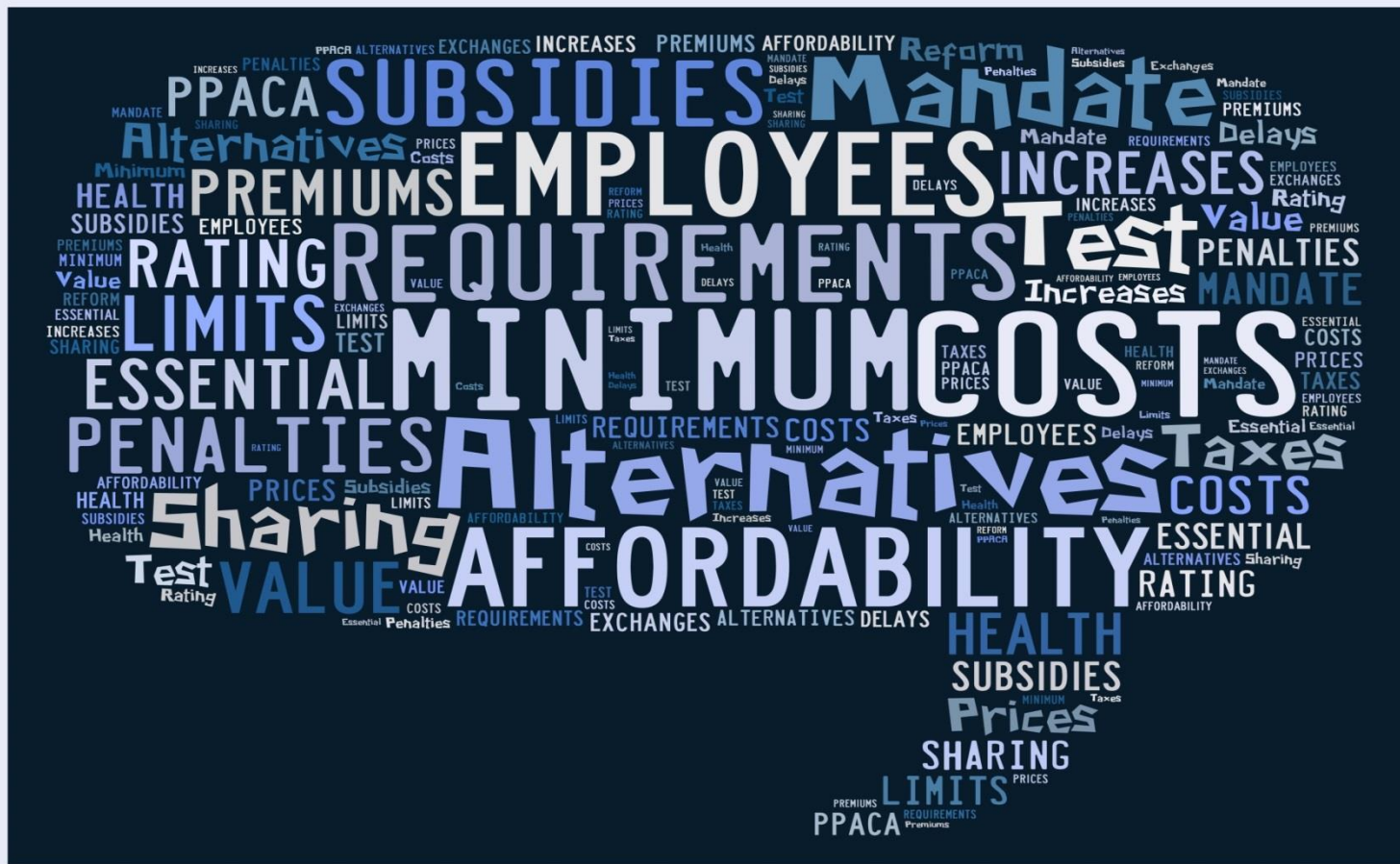
## The B Penalty

Not offering coverage to an employee or a child dependent that meets either the minimum value test, the affordability test or both

The penalty for the failure to offer coverage is \$2,000 x full-time employees not covered, minus the first 30 employees, i.e. your first 30 full time employees are exempt from the calculation.

The penalty for the failure to offer “affordable” and/or “minimum value” coverage is the lesser of two penalty calculations: \$3,000 per applicable employee or \$2,000 times every full-time employee, minus the first 30 employees.

At least one employee must receive subsidized coverage in the exchange to trigger penalties and you can't be hit with both the A and B penalties, it is one or the other.



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# Enforcement is Delayed for Most Mid-Sized Groups

- The final rules phase in the employer requirements for smaller employers, giving employers with less than 100 full-time equivalent employees (FTEs) but more than 50 FTEs until January 1, 2016, to comply.
- To be eligible, an employer will have to go through a certification process to demonstrate that during the period beginning on February 9, 2014, and ending on December 31, 2014, the employer does not reduce the size of its workforce or the overall hours of service of its employees in order to satisfy the workforce size condition.
- Employers will have to count full-time equivalent employees using the already established method of counting part-time employees in their employee total on a pro-rata basis, even though part-time employees do not have to be offered coverage if they work an average of less than 30 hours a week.
- Employers may establish a six-month period in 2014 to count employees to determine if the mandate applies for the subsequent year.
- If the employer uses the last few months of the year as its measurement period for applicability, the employer will not have to have a compliant plan in place for all employees by January 1. The employer will not be subject to penalties for the first three months of the year if such an employer establishes a compliant plan and offers it to all eligible employees by April 1.

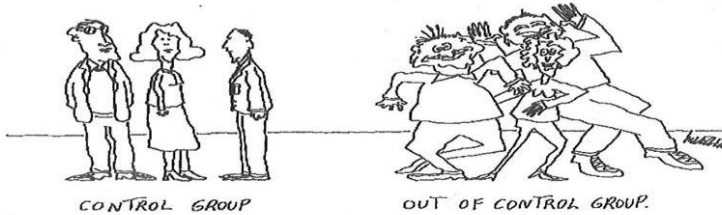
## SMALL Companies That are owned by larger companies

- Employees of entities that are part of a controlled group are still all aggregated when an employer is determining whether or not mandate enforcement would apply in 2015. However, applicable penalties will still be applied on an entity basis.
- The tax penalties will be applied separately to each member of the controlled group and each is separately liable, but for penalty purposes the whole group can only subtract 30 employees one time and must split the reduction based on the number of employees employed by each member company being penalized.

***EXAMPLE: A company with 800 full-time employees would be obligated to offer coverage or face penalties in 2015, as would its wholly owned subsidiary with 60 employees. However, if the 60 person subsidiary group did not offer affordable and minimum value coverage and the 800 employee parent company did, applicable penalties would be applied to the subsidiary separately according to a formula outlined in the final rule and the parent company would not be penalized for the actions of the subsidiary.***

# Controlled Group Rules

***In companies with common ownership, the IRS controlled group rules apply and all employees of controlled group are counted to determine mandate applicability.***



## Important Points to Know

- The group's CPA /tax counsel should already know what they are and this is not something a broker can legally determine for a company.
- The controlled group rules apply for 401Ks too.

Determining controlled group status is very complicated and a broker cannot legally do this for an employer. A summary of the rule for reference is it is two or more corporations generally connected through common control/stock ownership in any of the following ways:

- » Parent-subsidiary group
- » Brother-sister group
- » Combined group

• Normal shared ownership percentage is 80% but it can vary!

For reference, the IRS attempts to explain it all in this 108-page publication!

<http://www.irs.gov/pub/irs-tege/epchd704.pdf>

# Non-Calendar Year Plans

- Employers who offer non-calendar year plans and who have met *certain requirements* are not required to comply with section 4980H until the start of their ERISA plan years in 2015, rather than on January 1, 2015.
- The rules for eligible plans very similar to the conditions for transition relief in the proposed rule and begin on page 107 in the final rule.
- **MAJOR CONDITIONS**
  - *Maintained non-calendar year plan before December 27, 2012*
  - *Did not modify plan year after December 27, 2012*
  - *Did not change eligibility rules after February 9, 2014*

**IMPORTANT NOTE:** This provision applies to the ERISA plan year stipulated in the group's plan documents, not their plan contract renewal date ,and these dates may differ.! If a group doesn't have legal ERISA plan documents, the contract renewal date is the default date, but you need to create plan documents for DOL enforcement! If a group has appropriate plan documents, they may want to modify their ERISA plan year to conform with the plan renewal date for ease of administration, but they can only do that if the ERISA renewal date is later in the year than the plan contract renewal. If the ERISA date comes first, the plan needs to have all changes in effect on the date of the ERISA plan anniversary!

## Getting Compliant

**Problem:** Currently offer to all FT employees but plan isn't currently affordable or meets MBV

**By Plan Year Renewal in 2015:** Must offer affordable, MV benefits to its FT employees

**Benefit of Transition Relief:** No penalty for months prior to renewal if complaint by beginning of 2015 Plan Year

### REQUIREMENTS FOR NON-CALENDAR YEAR TRANSITION RELIEF

1. Maintained non-calendar year plan before December 27, 2012
2. Did not modify plan year after December 27, 2012

**Special Requirement:** Did not change plan eligibility rules after February 9, 2014

## All Employees Substantial Percentage

**Problem:** Currently offers to some but not all FT employees

**By Plan Year Renewal in 2015:** Must offer affordable, MV benefits to at least 60% of its FT employees and 95% of FT employees by 2016 renewal

**Benefit of Transition Relief:** No penalty for months prior to renewal if offer to all FT employees by beginning of 2015 Plan Year

**Special Requirement:** As of end of last open enrollment before 2/9/2014

Offer to at least **33%** of all employees **OR** Cover at least **25%** of all employees

## All Full-Time Employees Substantial Percentage

**Problem:** Currently offers to some but not all FT employees currently and cannot meet the all employees test

**By Plan Year Renewal in 2015:** Must offer affordable, MV benefits to at least 60% of its FT employees and 95% of FT employees by 2016 renewal

**Benefit of Transition Relief:** No penalty for months prior to renewal if offer to all FT employees by beginning of 2015 Plan Year

**Special Requirement:** As of end of last open enrollment before 2/9/2014

Offer to at least **50%** of all FT employees **OR** Cover at least **33%** of all FT employees



## What If The Group doesn't offer dependent coverage now?

### Dependent Coverage

- Applicable employers will not face tax penalties relating to the offering of dependent coverage provided that employers take steps during plan years that begin in 2015 toward satisfying the dependent coverage requirements by their plan year renewal in 2016.

# Multi employer plans

## **For union/multi-employer plans, an employer won't be penalized if:**

- The employer is required to make a contribution to a multiemployer plan with respect to a full-time employee pursuant to a collective bargaining agreement or appropriate related participation agreement
- Coverage under the multiemployer plan is offered to the full-time employee (and the employee's dependents)
- The coverage offered to the full-time employee meets the law's affordability and minimum value standards.
- The final rule makes it clear that this policy will carry forth until such a time when the IRS issues different guidance on the topic. The final rule says that should the current requirements ever change, the change will be applied prospectively, so that employers will always have the chance to come into compliance before being penalized.



## Who has to be offered coverage?

- Full Time Employees (30 hours or more a week)
  - Dependents who are defined as employee's children under age 26 (IRC §152(f)(1) Final rule excludes step-children.
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- Employers will not face tax penalties for electing not to offer coverage to spouses.
  - If a spouse has no other source of affordable employer-sponsored coverage, he/she could get an exchange subsidy.



### **Key Points About The Coverage Offer Requirement**

- A large employer will be considered as offering coverage to full-time employees and can avoid the “A” penalty if they offer minimum essential coverage to 70% of the FT employees and dependents in 2015.
- All eligible employers will need to offer coverage to 95% of eligible employees and their dependents in 2016 to avoid potential tax penalties under section 4980H(a)
- The choice to exclude certain classes of workers (such as variable hour employees) in order to fall under the 70 percent coverage standard may be deliberate for 2015, as this transition relief was intended to make the transition to the 30 hour/week standard of offering coverage easier for employers.
- If any of the 30% of full-time employees and dependents (and in later years the 5%) who are not offered coverage receive premium tax credits from an Exchange, the employer will be required to pay the “B” penalty--an annual penalty of \$3,000 for each of those employees that gets subsidized coverage.

**Eligible employers  
will only have to  
offer coverage to  
*70 percent*  
of FT workers in  
2015 to avoid the  
“A” Penalty.**

# Participation Requirements

- HHS rules have prohibited participation and contribution requirements for large group fully insured market issuers.
- HHS has required small group carriers to have a requirement-free open enrollment period from Nov 15-Dec 15 annually.
- Participation requirements cannot be applied on renewal.
- The HHS participation requirements are under the guarantee issue and renewability provisions of the law and so they do not appear to apply to any participation and contribution requirements that may be applied by stop-loss issuers.

# Determining Full-Time Employee Status

- Generally, an employee who was employed on average at least 30 hours of service per week or 130 hours of service per month is considered full-time.
- When calculating hours of service, the following general rules apply:
  - The common law definition of employee is used.
  - All hours of service an employee performs for members of the controlled group are counted.
  - Each hour for which an employee is paid, or entitled to payment, for performance of duties for the employer is counted including vacation, holiday, illness, incapacity (including disability), layoff, jury duty, military duty or leave of absence
  - Special rules for variable hour employees



# Special Cases

- The rules provide that the service hours of certain types of individuals are not taken into consideration, even if these individuals receive some form of compensation (such as expense reimbursements).
- You don't have to count:
  - ✓ Hours worked by individuals who meet a definition of a bona fide volunteer if they aren't receiving wages for that time.
  - ✓ Students who are participating in the federal work study program or a similar state-based program
  - ✓ Individuals who work for religious organizations who have taken a vow of poverty.
- *Regular student workers and paid interns do have to be counted, but you can apply variable hour rules and a standard measurement period to these employees.*

# Hard To Track Hours

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## Airline Workers (Layover Hours)

The IRS says it's still figuring out how to treat these airline employees under the law but that in the meantime, their companies should just be "reasonable" about how to count these layover hours. If a flight attendant is paid during time spent in a layover, the rule notes it's only reasonable to count those hours toward full-time status.

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## Cruise Ship Workers

Workers can't be considered as working outside the US, but any work paid for by "sources outside the United States" won't count toward the cruise ship's health care calculation.

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## Adjunct Faculty

Every hour an adjunct faculty member teaches in a classroom counts as two-and-a-quarter hours of actual work. Required office hours or faculty meetings, however, are based on actual time.

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## On Call Workers

Until further guidance is issued, employers of employees who have on-call hours are required to use a reasonable method for crediting hours of service

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# Staffing firms and PEOS

- Offering Coverage

- ✓ The determination has to be made if the employee is the “common law” employee of the hiring company or the PEO or staffing firm. The IRS states that in typical cases the PEO or staffing firm is not the common law employer.
- ✓ A staffing firm or PEO may make the offer coverage for the hiring employer, but if the hiring employer is an employer subject to the mandate, the employer’s obligation to offer coverage will only be satisfied if: “the fee the client employer would pay to the staffing firm for an employee enrolled in health coverage under the plan is higher than the fee the client employer would pay to the staffing firm for the same employee if the employee did not enroll in health coverage under the plan.

- Tracking Hours

- ✓ When tracking hours due to extreme variability in practices within this industry, temp firms are directed to calculate their employees’ hours based on “the typical experience of an employee ... with the temporary staffing firm.”

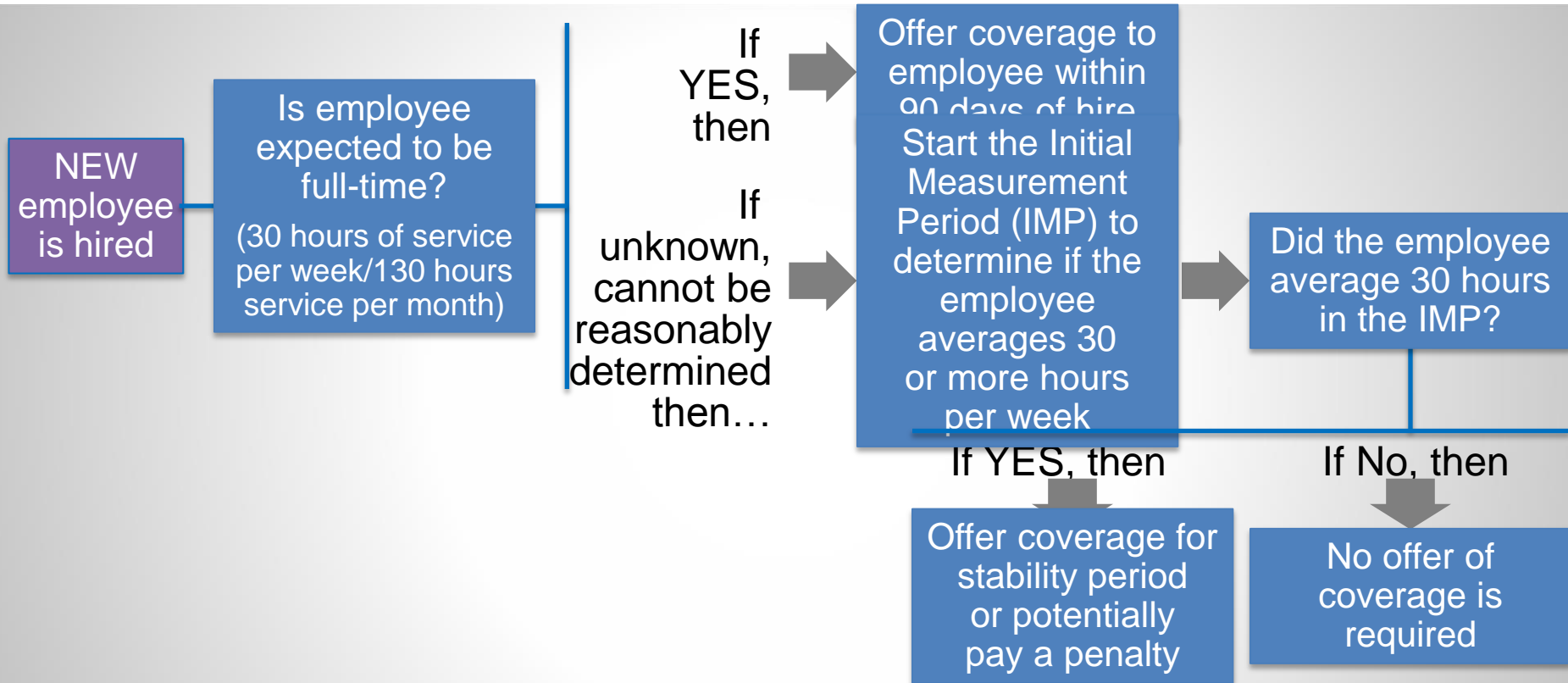
# Rehires

The final rule retains the requirements for an employer to use when classifying an employee with a break in service as a “rehire” with regard to the coverage rules

The final rule reduces the length of the break in service required before a returning to be treated as a new employee from 26 weeks to 13 weeks. This break-in-service period applies for both the look-back measurement method and the monthly measurement method.

So that educational employees are not treated as rehires after summer break, the 26 week window is applied for them only.

# Full-Time Status Determination



# Other Odds And Ends in the 227 Pages of Fun

- In addition to all of the rule changes, the final rule maintains a number of provisions included in the proposed rules, including :
  - ✓ The optional look-back measurement method of determining full-time employee status
  - ✓ Employer affordability safe harbors based on employee W2 wages, rates of pay or the federal poverty guidelines.

**The rule also includes many specific examples about what is and is not permissible, so if you are still confused, don't fret—the IRS has your back!**

# Planning Ahead

“The nicest thing about not planning is that failure comes as a complete surprise, rather than being preceded by a period of worry and depression”

- *Sir John Harvey-Jones*

**NAHU strongly urges our membership to use 2014 as a transition year with your clients. It's a great opportunity to test employee counting strategies, managing hours worked, etc. and to assess liabilities and system vulnerabilities without significant financial consequences!**



# Compliance Checklist

- Estimate whether the mandate is likely to be enforced for the group in 2015
- Look into any common control issues
- Determine a six-month measurement period for 2014
- Review eligibility for transition relief for non-calendar year plans
- Review ERISA plan documents
- Review plan to see who is offered coverage now and the types of coverage offered and if changes need to be made for 2016 to avoid penalties
- Determine if you need to track variable hour workers and utilize measurement periods and stability periods and how best to use them to your advantage
- Make decisions as to whom to offer health care coverage
- Determine what coverage to offer
- Stake steps to minimize penalties and cost of providing health care

# Employer reporting requirements: *The Next Big Thing!*

Extensive employer reporting required for “Play or Pay” mandate and employee eligibility for exchange subsidies. Reporting loop will include employers, employees, insurance issuers, exchanges and IRS.

## **IRC 6055 Reporting**


- To facilitate IRS enforcement of the individual mandate
- Employers to report individual enrollee coverage during preceding year
- First “information returns” to be filed with IRS in 2015?
- Also written statement to each individual named in the information return

## **IRC 6056 Reporting** (for periods beginning after Dec 31, 2013)

- Employer to report information on terms/conditions of coverage provided to employees
- To assist IRS in determining whether employer is subject to “Play or Pay” penalties for failing to provide affordable and minimum value coverage
- Report to include:
  - Name and EIN
  - Certification whether employer offers FT employees and dependents opportunity to enroll in minimum essential coverage and duration of waiting period
  - Months in CY when coverage available
  - Monthly premium for lowest cost option
  - Employer’s share of total allowed costs
  - Name and taxpayer ID for each FT employee and the months during which employee was covered under employer plan

***Employer Reporting Rules Expected By Spring 2014***

# *Other Employer responsibilities: It's Not Just The Mandate*

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- **Employers are also responsible for maintaining a PPACA-compliant plan, which includes adherence to market reform requirements, notice requirements, etc.**
  - **While health insurance carriers assume some responsibility for fully insured plans, there are compliance burdens for all size employers too**
  - **The Department of Labor has enforcement authority. Primary enforcement means is audits, and significant resources and funds have been dedicated for audits in 2014 and on forward.**
  - **Top audit trigger--employee complaints! Others include IRS memorandum of understanding, third party vendors and form 5500 filings.**
  - **Fines can be heavy! Up to \$100 per day per violation for each impacted beneficiary.**



# Employer Coverage Market Requirements

## Employer Coverage Requirements

- Policies sold in the small or large group market and employer-sponsored group health plans must comply with market reforms under the ACA and certain other HIPAA/ERISA/COBRA benefit rules (including but not limited to):
  - dependent child coverage to age 26,
  - prohibition on preexisting condition exclusions, preventive services with no cost sharing,
  - prohibition on annual/lifetime dollar limits on any EHBs offered,
  - waiting period limitations,
  - cost-sharing limits
  - group health plan reporting and disclosure
  - clinical trials coverage
  - mental health parity, etc.
- Policies sold in the small or large group insurance market must also comply with state insurance market reforms and state benefit mandates

# 90-Day Waiting Period Requirement

**A group health plan or health insurance issuer offering group health insurance coverage may not apply any waiting period that exceeds 90 days.**

**All calendar days are included in the 90-day period, including weekends and holidays, and the enrollment date counts as day one of the waiting period**

**The rules apply to group health plans of all sizes, grandfathered plans, fully insured and self-funded plans.**

**Plans may not require that employees will become eligible for insurance coverage on the first of the month after 90 days. IRS guidance indicates that this plan design is not acceptable as it would typically exceed the 90-day limit.**

**An employer whose waiting period exceeds 90 days beginning in 2014 can be penalized for every month the employer does not offer coverage if any employee obtains coverage through an exchange and is eligible for a premium tax subsidy.**

# Other Employer Requirements

## IRS Nondiscrimination Rules

- Currently delayed enforcement but rules governing all fully insured plans expected before 2015

## W2 Reporting

- Large employers must report health plan value on 2012 W2s on forward
- Requirement currently optional for employers that issue less than 250 W2s
- For “informational” purposes, not the taxation of benefits

## Auto Enrollment

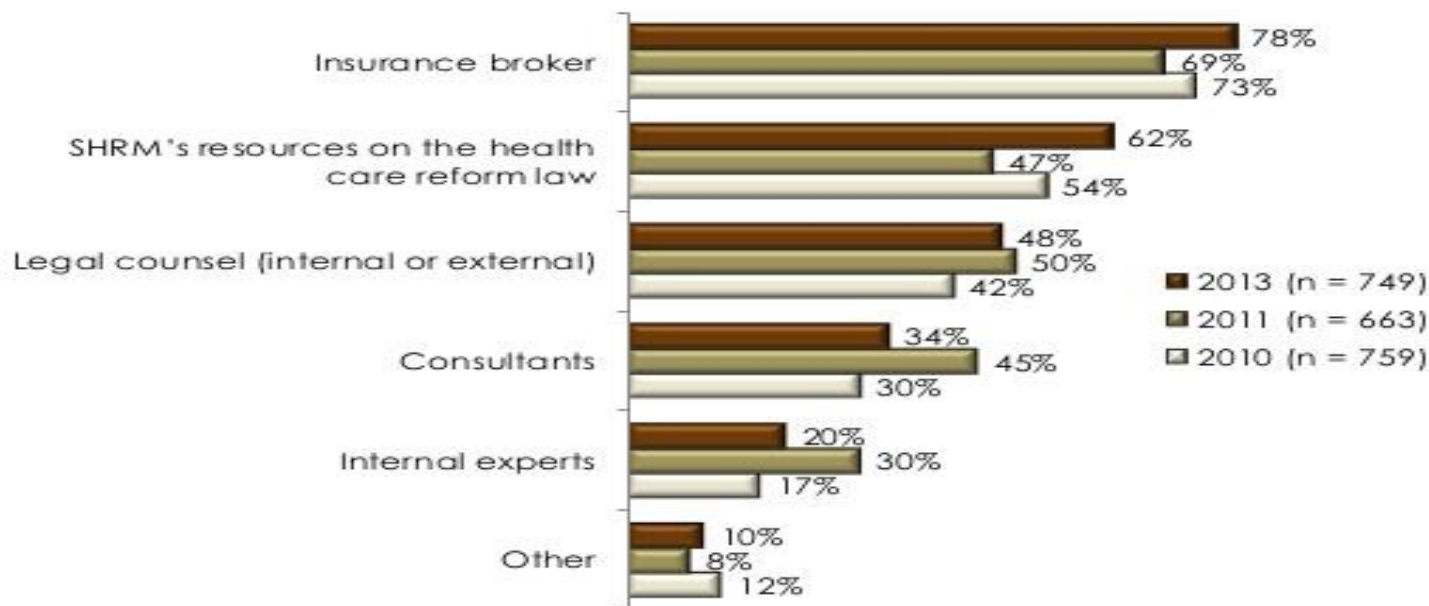
- Employers with more than 200 employees will have to begin auto-enrolling new employees in benefit plans
- Still need regulations on how opting out will work, coverage waivers, waiting periods, etc.
- Effective date is unclear—not until 2015 at least

*Opportunity*



***NEXT EXIT***

## What resources is your organization currently using in regard to the health care reform law?



Note: n = 749. Percentages do not equal 100% due to multiple response options.

# NAHU Resources to Help

- Washington Update
- Compliance Corner
  - Resources and Webinars
  - Customized Answers to Compliance Questions
  - FAQs
- PPACA Certification Course
- Plan Doc Builder and ACA Dashboard



# Q & A

