Bloomberg BNA

Health Insurance Report™

COMPLIANCE CORNER: 12 ACA Compliance Boxes You Should Have Checked Already

BY R. PEPPER CRUTCHER JR.

Before 2010, there was no such thing as an ACA lawyer. Since 2012, your author has been one, serving employers, providers, insurers, brokers, plan administrators, consultants and IT solutions developers. Pony Express messengers may have been shot more regularly, but maybe not. An early client put it bluntly: ''I'll pay you to show me a way out of this, but I'm not paying just to be told exactly how bad it is.''

Interest ran high after the Supreme Court upheld the law in June 2012 but subsided quickly, as employers convinced themselves that a President Romney would ride to their rescue. The voice mail box was full on the morning of Nov. 5, 2012, but things stalled with the enforcement delays announced in mid-2013. The regulatory blizzard of early 2014 sent insurers, brokers and plan administrators looking for help, but not employers. Then, Republicans captured Congress in November and the cavalry again seemed to be just behind the dust cloud on the horizon, so employers kept their wagons circled.

Employers, if you have delayed ACA compliance this long, you have delayed too long. Even if things go your way this June in *King v. Burwell*, you'll be unprepared for EBSA compliance audits and for IRS coverage offer reporting that is independent of that case. And there's more than you think riding on the bet that things will go your way. Here are 12 ACA compliance boxes that large employers should have checked already.

Crutcher (pcrutcher@balch.com) is a labor and employment attorney in the Jackson, Miss., office of Balch & Bingham LLP. As head of the firm's Affordable Care Act practice, he has helped develop ACA compliance software, has negotiated ACA compliance terms of union contracts, and regularly speaks and writes about employer, broker and insurer ACA compliance.

☐ Confirm that fully-insured, management carve-out plans really are grandfathered.

Five+ years ago, the ACA mandated issuance of rules, similar to those written under 26 U.S.C. § 105(h), penalizing fully-insured group health plans that discriminate in favor of highly compensated employees. The § 105(h) rules already applied to self-funded plans. The IRS invited comments in Notice 2010-63, then, in Notice 2011-1, coupled warnings with assurance that the rules, as yet unwritten, ''will not apply until plan years beginning a specified period after issuance. Before the beginning of those plan years, an insured group health plan sponsor will not be required to file IRS Form 8928 with respect to excise taxes resulting from the incorporation of PHS Act § 2716 into § 9815 of the Code.'' There followed 13 questions about what the rules should be. Then, in January 2014, news broke that no such rules would be issued until after the 2014 elections, and many employers tuned out.

Management carve-out plans are the archetypical group health plans favoring highly compensated employees. The ones that are ''grandfathered'' under ACA § 1251 should not be subject to the new IRS rules, according to ACA § 1251(a)(2). But many employers are under a false impression that their plans are grandfathered, even though the relevant rules were among the first ACA rules published, way back in 2010.

It's an all-or-nothing proposition. Grandfathered status depends on documentation and notices and can be lost due to technicalities. There's no option for recovery of grandfathered status, once lost. If you have a fully-insured group health plan that favors highly compensated employees, confirm its grandfathered status before the new discrimination rules are published. Guard it jealously thereafter.

☐ Determine whether to limit group health plan eligibility to full-time employees.

Read the next seven items, each of which presents a very simplified summary of relevant rules, then come back to this one.

Now that you grasp the administrative burden of ''full-time'' eligibility tracking and coverage offer reporting, consider opening your group health plan to all employees who stick around for three months, maybe less, regardless of their ACA ''full-time'' status. There's real potential for adverse selection, of course. Part-time employees who use most of their pay to buy your insurance might need your insurance much more than others. So, run the numbers and obtain the approval of your insurer or self-insured plan administrator, including any required plan amendment. Additional claim costs in some workforces might be offset fully by avoided administration costs.

☐ Implement an IT solution for full-time status tracking and coverage offer reporting.

Large employers will encounter ACA compliance administrative burdens and costs that few have anticipated. Waiting much longer to plan for them will be waiting too late. Fees for lawyers and consultants will peak late this year, when we who know the rules are uncomfortably busy already. Things will be worse if the work must be done after receipt of an assessment or audit notice in 2016.

Much good lawyering, including some of your author's, has gone into development of employer ACA compliance IT solutions that are good today and that are getting better, offered by payroll processors, HRIS (Human Resource Information System) vendors, third party administrators, benefit plan consultants, and not just by the big boys. Some of the best we have seen are the work of relatively small, regional firms. One of the worst came from a corporate giant. Come early 2016, you might be able to generate, file and deliver your Forms 1094 and 1095 reliably with a few screen taps on your mobile device. Getting to that point will take months of thorough preparation.

☐ Determine how to acquire and process all the data required by that IT solution, to produce accurate results and to facilitate 2016 automation of Forms 1094 and 1095.

Some IT solutions are comprehensive. Some require manual data imports from other sources. Others can be set up to import and update automatically. But the longer you wait to implement a solution, the more 2015 coverage month data you'll have to retrieve during system setup. Ideally, you would like to have time to bring the system current, to automate as much data importation as possible, and then to test the system using your real world data. There will be glitches. Not HealthCare.gov ''glitches,'' probably, but problems that you and your vendor will need to solve. The sooner you know what your system can't yet do reliably, the more likely that your system will do it reliably in early 2016.

☐ Determine whether to measure full-time status using the look-back measurement method.

''The . . . what?'' That was the response of an HR executive recently, on first hearing a presentation on how to use the 26 C.F.R. § 54.4980H look-back measurement method to judge the ACA full-time eligibility of certain classes of employees. You won't read about it in the ACA. It's an option, created by the IRS to facilitate ACA compliance. But for this alternative method, employees with varying hours of service might move in and out of full-time eligibility status month-by-month. A prime benefit of the look-back measurement method is substituting a period as long as 13 months (and change) for the maximum 90-day waiting period that applies to new hires under the monthly measurement method. But to get that benefit, an employer must accept a substantial administrative burden. Keep reading.

☐ Determine the Standard Measurement, Administrative and Stability Periods to apply to ongoing employees in each employee group.

What are your Standard Measurement, Administrative and Stability Periods for 2015? If you're using the look-back measurement method, you should know. Ideally, you should have determined those periods in 2013 or 2014, using your actual ''hours of service'' data. ''Standard'' periods apply to ''ongoing'' employees—i.e., those who have worked without a break in service for at least one full Standard Measurement Period. The average weekly hours of service of each such employee during the Standard Measurement Period are reviewed during the (optional) Standard Administrative Period to determine his or her full-time eligibility status during an associated, succeeding Stability Period. An employee measured as full-time is entitled to full-time status for the entire, associated Stability Period, and if part-time, then to part-time treatment, regardless of hours of service during the Stability Period, absent a material job change. The Stability Period coincides with a new Standard Measurement period so that there is no gap. If you set it up correctly, an employee's current status always should be known, based on a prior Standard Measurement Period.

You need not have the same Standard Measurement, Administrative and Stability Periods for all employees, but there are rules about which groups may have different Periods and there are rules about how often an employer may change the Period durations. *See* 26 C.F.R. § 54.4980H-3(d)(v).

☐ Determine which new hire classifications are subject to look-back measurement method.

All ongoing employees may be subjected to the look-back measurement method, but not all new hires. An

   ISSN 2154-8986

employee hired with the reasonable expectation of 30 or more average weekly hours of service is entitled to an offer of coverage, if eligible, under the monthly measurement method, and in compliance with the maximum 90-day waiting period rules. These objective factors, among others, as of the hire date, will be used to determine whether the employer properly subjected a new hire to the look-back measurement method:

> whether the employee is replacing an employee who was (or was not) a full-time employee, the extent to which hours of service of ongoing employees in the same or comparable positions have varied above and below an average of 30 hours of service per week during recent measurement periods, and whether the job was advertised, or otherwise communicated to the new hire or otherwise documented (for example, through a contract or job description), as requiring hours of service that would average 30 (or more) hours of service per week or less than 30 hours of service per week.
>
> 26 C.F.R. § 54.4980H-3(d)(2)(ii). No one factor controls this determination. And, ''An educational organization employer cannot take into account the potential for, or likelihood of, an employment break period in determining its expectation of future hours of service.'' Expect enforcement agencies to audit these determinations in the course of any other ACA compliance review.

☐ Determine the Initial Measurement, Administrative and Stability Periods to apply to each employee group subject to the look-back measurement method.

Okay, you're done with the easy part. If you use the look-back measurement method to determine the ACA full-time eligibility status of an appropriate new hire group, every one of them will have his or her own, Individual, Measurement, Administrative and Stability Period. Commonly, you'll find that employees are simultaneously in an Individual Measurement Period and a Standard Measurement Period. There are good reasons, not appearing in the rules, why few, if any, employers should select a three-month Measurement Period, even though the rules expressly grant that option. And, a material job change during an Initial Measurement Period can mandate review under a materially different set of rules.

Do you know how your Initial and Standard periods mesh with each other for each employee group? You should, if you're going to use the look-back measurement method.

There are IT solutions in the market now that present all of this babble to you in dashboard graphic form, so that you can see at a glance where you should be spending your time and attention.

☐ Determine whether to document full-time status or to monitor and manage full-time status under the look-back measurement method.

Do you pick your 401(k) funds and then ignore their performance? Or do you watch them and change them based on their performance? There's an added wrinkle for employers who want to monitor and manage employee accrual of full-time eligibility under the look-back measurement method.

Both the ACA and ERISA have anti-retaliation rules. Some believe that it's retaliatory to hold employees short of 30 weekly hours of service in order to preclude their full-time eligibility. It's too early to tell how such claims will fare under ACA and ERISA anti-retaliation rules, but such claims are foreseeable.

☐ Determine whether and how to secure Exchange notices of subsidy certification.

And speaking of ACA retaliation, the statute, 29 U.S.C. § 218C forbids employers to discriminate against employees who have secured subsidies to buy health coverage through an ACA Exchange. Exchanges were supposed to notify employers of such awards promptly, starting in late 2013, but that part of HealthCare.gov was not built in late 2013. It wasn't built in 2014. For all anyone outside HHS knows, it may not be built today. At some point, maybe late this year, employers of subsidy recipients should begin to receive paper notices. Electronic notices may become the norm in 2016. Receipt will trigger a 90-day appeal right—for example, if the employee won the subsidy by false attestation of the employer's failure to offer affordable, qualifying coverage. Do managers who make hiring, firing, pay and discipline decisions need to know who has received an Exchange subsidy? Those who don't need that information probably shouldn't have it, and you should have implemented practices to assure that you can prove that they did not have it.

☐ Determine whether to use an affordability safe harbor and, if so, which one for each employee group. Also, determine whether to discriminate in favor of lowly compensated employees in order to make their coverage ''affordable.''

Two sorts of non-deductible excise taxes may be assessed under 26 U.S.C. § 4980H. The § 4980H(a) tax is a monthly amount multiplied by a number just short of the employer's number of full-time employees for the month. It's imposed because the employer failed to offer minimum essential coverage to substantially all of its full-time employees and their dependents for the month. The § 4980H(b) tax is a higher number multiplied only by the number of full-time employees receiving an Exchange subsidy during that month as a result of the employer's failure to offer them minimum essential coverage that's minimally valuable and ''affordable.'' Affordability is determined by comparing the employer's premium share for the lowest-cost, self-only qualifying coverage with the employee's household Modified Adjusted Gross Income. Since few employers will have the data to do that accurately, the IRS created four affordability ''safe-harbors,'' described in 26 C.F.R. § 54.4980H-5(e). Cutting to the chase, the only one that's always safe is the federal poverty line safe harbor:

> An applicable large employer member satisfies the federal poverty line safe harbor with respect to an

> employee for a calendar month if the employee's required contribution for the calendar month for the applicable large employer member's lowest cost self-only coverage that provides minimum value does not exceed 9.5 percent of a monthly amount determined as the federal poverty line for a single individual for the applicable calendar year, divided by 12. For this purpose, if coverage is offered during at least one day during the calendar month, the entire calendar month is counted both for purposes of determining the monthly amount for the calendar month and for determining the employee's share of the premium for the calendar month. For this purpose, the applicable federal poverty line is the federal poverty line for the State in which the employee is employed.

26 C.F.R. § 54.4980H-5(e)(2)(iv). Some employers have concluded that the burden of tracking and correcting affordability problems outweighs the § 4980H(b) tax exposure. Others permissibly monitor their premium requirements and adjust premiums or compensation to maintain affordability for all full-time employees.

Like other § 4980H compliance problems, this one could vanish soon for employers with employees only in states served by HealthCare.gov. That's because the Supreme Court may rule, in *King v. Burwell*, argued March 4, 2015, that only ACA Exchanges established by a state may grant subsidies. Subsidy certification of your full-time employee triggers your § 4980H tax assessment. No subsidy, no assessment. At least, that's the prevailing assumption.

☐ Determine whether and how to claim employer mandate credit for employees leased in full-time status less than one year.

We never met a wurst we didn't like, and here's the worst of this. Under existing rules, employees leased in full-time status for less than a year may be the W-2 employees of the leasing firm but the ACA ''full-time employees'' of the employer directing and controlling their work. Apparently for that reason, the IRS § 4980H rules permit an employer to claim credit, under certain circumstances, for qualifying coverage offers made to those employees by their leasing firm employer. How so? Assuming that all group health plans in this picture are fully-insured, our preliminary, cautious conclusion is that the employer claiming the 2015 coverage month credit must report those coverage offers to the IRS in early 2016 on Forms 1095-C and 1094-C, probably entering Code 2E on Line 16 of Form 1095-C. Do you have such workers? Do you need to claim § 4980H credit for the leasing firm's coverage offers to them? Do you know how you will obtain the needed data, and when? You should know all of those things by now.

  HIR ISSN 2154-8986