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Legislative Update (ACA): **What's In, What's Out,** and What You Need to Know

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The Road to ACA

An Overview

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ACA's Incremental Introduction



The ACA was introduced with consumer-friendly gains, building up to the main objectives – the employer and individual mandates.

- Patient Protections
- Preventive Care Coverage
- Dependent Coverage to Age 26
- Elimination of Pre-Existing Conditions
- Medical Loss Ratio (MLR) Requirements
- Employer Mandate
- Individual Mandate
- Requirement to Report – W2, 1094/1095

Foundational Rules of ACA



- 1 Individual must have minimum essential health coverage or pay a penalty
- 2 Premium tax credits are available through the exchanges for those qualified
- 3 ALE must offer MEC coverage to 95% of full-time employees or pay an "A" penalty

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The Rocky Road




- Exchanges / Marketplaces were created
 - Medicaid expanded
 - Subsidies unchecked
 - Rates increased; low cost coverage not as accessible as planned
- Additional Employer Taxes Imposed
 - Transitional Reinsurance Fee
 - PCORI Fee
 - Health Insurance Provider Fee
 - Costs continue to rise
- Requirement to measure Employee hours introduced

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Repeal and Replace

Strategies and Executive Orders



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Repeal and Replace – the Republican Strategy



- Get rid of the individual mandate
- Repeal or severely reduce the employer mandate
- Eliminate the employer reporting burden
- Repeal of ACA tax provision penalties
- Delay of others (Cadillac Tax)
- Pursue other, market-driven means for Americans to have access to affordable care through loosening of restrictions

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President Trump's Inauguration Day Executive Order



- Issued on January 20, 2017
- Reiterates objective to repeal the ACA
- Sets broad policy for federal agencies to minimize or delay ACA enforcement
- Requires agencies that need to revise regulations to comply to do so by following the Administrative Procedures Act

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Inauguration Day Executive Order: Practical Application



- Repeal ACA — by working with Congress, via the budget reconciliation process
- Less regulatory oversight — encourages departments in the Executive branch to:
 - Alleviate burdens imposed by the ACA
 - Potentially delay or not enforce certain ACA provisions
- State autonomy — encourages states to exercise control over the healthcare market to create more choice, and to work with federal agencies to develop new programs. Alludes to:
 - Allowing purchase of insurance across states
 - Establishing terms and conditions of Medicaid expansion
 - Determining coverage levels and mandates (essential health benefits and other market reform provisions)

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President Trump's Executive Order- Reduce Regulation and Control Costs



- Issued on January 30, 2017
- Establishes a two-for-one policy: For every one regulation issued, two regulations must be identified for elimination
- Cost neutral: Keep cost of complying with new regulations at zero, unless required by law or authorized by the Director of the Office Management and Budget (Director)
- Implements cost parameters: Each executive agency will receive during the Presidential budget process an incremental cost allowance from the Director, **regulations exceeding the agency's incremental cost allowance for that fiscal year will not be allowed**

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Proposals to Replace the ACA



The following plans have been under consideration.

Republican proposals:

1. **Graham-Cassidy-Heller-Johnson Amendment**
2. **The Health Care Freedom Act, 2017**
3. **The American Health Care Act** (Passed by the House of Representatives on May 4, 2017)
4. **The Better Care Reconciliation Act** (failed x 2)
5. **Obamacare Repeal Reconciliation Act of 2017**
6. **Patient Freedom Act of 2017**

Democrat proposals:

1. **Medicare for All Act** (Conyers version, followed by Sanders version)

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Update on ACA – Executive Orders



- **President Trump's Oct. 12 Executive Order – "Promoting Healthcare Choice and Competition Across the United States"**
- Purpose: to expand flexibility.
 - Allows for Association Health Plans (AHP) to be offered again. Commands DOL, HHS and Treasury to look at "relaxing" rules for AHP. New guidelines to be released within 60 days. Facilitates purchasing coverage across state lines.
 - Reverses short term duration policies (STLDP) - currently limited to three months (EO looks to extend this to longer periods), allows exclusion of EHB, limits on certain plans and limited underwriting guidelines
 - Allow HRAs to be used for payment of premiums for individual policies and other flexibilities.
- **Employer Impact:** Executive order did not change law, but requests agencies to begin proposing regulations.
 - AHP regulations already at OMB

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Update on ACA – Executive Orders



- Cost Sharing Reductions (CSRs): help lower-income individuals purchase exchange coverage
 - Federal gov't was reimbursing insurers, who were obligated to provide CSRs to individuals
 - *House v. Burwell* (May 2016) court ruled federal gov't cannot reimburse insurers for CSRs because funds were not appropriated by Congress.
 - Obama Administration appealed; reimbursements continued
- Payments to insurers were halted in early October: followed by a request to issue preliminary injunction against the Administration, and a lawsuit filed by 18 states and D.C.
- Federal judge denied preliminary injunction to immediately reinstate the subsidies, which would have totaled \$7 billion in 2017. Insurers remain obligated. However, judge cites:
 - "Most states have already prepared for the termination of the payments, and priced 2018 premiums based on the assumption that the CSRs would not continue"
 - "The vast majority of states have already devised responses that give millions of lower-income people better health coverage options than they would otherwise have had"



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Update on ACA: Repeal and Replace Efforts



- Healthcare Market Certainty and Mandate Relief Act (Hatch/Brady) – Nov. 1
 - Funds CSRs through 2019
 - Suspends individual mandate for 2017 – 2021
 - Suspends employer mandate for 2015-2017
 - Increases max contribution limit for HSAs
 - Needs 60 votes (unlikely)
- Bipartisan Health Care Stabilization Act of 2017 (Alexander/Murray) – Oct. 19
 - Provides for temporary extension of CSR funding
 - Lacks House support

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ACA Requirements Updates - Recent Activity



- **Emergency Services** — plan must cover OON services no differently than in-network.
 - Regulations provide for "greater of three" approach to reimbursement: Medicare rate, R&C, or network contracted rate.
 - Court case brings reimbursement to question; returned regulations back to agencies for clarification
- **Contraceptive Coverage** — preventive care must include contraceptive coverage. Religious employers exempt; accommodations for others.
 - Religious exemption expanded to non-profit or for-profit, closely held or publicly-traded based on sincerely held religious belief
 - Additional exemption based on sincerely-held moral convictions
 - No special forms/notice requirements (unlike previously)

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ACA's Future

Current activity impacting GHPs

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Will Tax Reform Address ACA?



- Tax Cut and Jobs Act - passed 11/16
- Senate version – passed 12/2
 - Includes elimination of individual mandate penalty in 2019
 - Neither bill removes employer mandate
- House/Senate conference process
 - to work out differences and bring joint bill back for a vote
 - May be a while – Senate bill had 350 different amendments

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What Parts of the ACA Would Likely Survive?



- Federal and State based Exchanges
- Guaranteed issue and renewal for individual coverage, with no ability to decline coverage due to pre-existing conditions
- Age-rated Premiums (ratio changes from 3:1 → 5:1)
- Medical loss ratio reimbursements
- Federal risk mitigation funds for insurers

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What Parts of the ACA Would Likely Survive?



- No cost-sharing for preventive services
- Child coverage to age 26
- External review and appeal process
- Provider nondiscrimination rules
- Out of pocket maximums
- Essential health benefits (but allow for state waivers) along with cost sharing limits
- Section 1557 Nondiscrimination Rules
- Wellness incentive limits (30% up to 50% for tobacco-free)

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The Commonsense Reporting Act (H.R. 3919 & S. 1908)

Bills introduced to lessen the burden of reporting



- Would minimize the challenges of the ACA reporting requirements
- Permit employers to **voluntarily** report to the IRS **prospectively**, in advance of the start of the coverage year, whether a health plan offered for the current plan year is Minimum Essential Coverage, meets Minimum Value and is affordable
- The employer would also prospectively identify the waiting period and state whether coverage will be available for the full 12 months. Employers would then be able to provide coverage updates through a federal data hub if the coverage offered changes. The IRS could use this information to confirm whether an employee is eligible to receive a premium tax credit during the exchange enrollment process, rather than at the end of a tax year
- Require employer reporting **only for** those employees about whom an employer has received notification that the employees or their dependents purchased coverage through an ACA Marketplace exchange, rather than issuing reporting statements for the entire workforce
- Clarify that the IRS can accept full names and dates of birth in lieu of dependents' and spouses' Social Security numbers

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HHS Proposals for 2019



- Issued November 2
- Proposes changes to Exchanges and ACA insurer provisions for 2019
- Impact on Group Health Plans
 - Introduces additional flexibility for SHOP enrollment process
 - Adjustments to MLR Calculation to lessen burden on insurers – fewer health plans would receive rebate
 - Flexibility for states to change EHB benchmark plans (annually) – impact to group health plans use of annual and lifetime limits and OOP max

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Tax Cuts & Jobs Act: Impact on Benefits



- On December 22, 2017, the President signed into law the Tax Cuts & Jobs Act.
- This Act had some impact on employee benefits, but not as much as first proposed.
- **Health Plans:**
 - **Effective 2019**, eliminates the tax penalty under the Affordable Care Act's individual mandate (requirement for "minimum essential coverage")
 - Employer mandate remains in place
 - Employers will continue to be required to prepare, distribute and file Forms 1094-C and 1095-C
 - **Potential Impact:** With young, healthy individual's exiting the risk pool with no requirement to maintain health insurance, employer plans could become more expensive to maintain.

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Tax Cuts & Jobs Act: Impact on Benefits



- **Fringe Benefits:**
 - **Effective 2018**, the Act repeals the employer deduction for qualified mass transit and parking benefits, except as necessary to ensure the safety of an employee.
 - **Effective for years after December 31, 2017, and before January 1, 2026**, the Act repeals the exclusion from gross income and wages for qualified bicycle commuting reimbursements. Employer reimbursements for bicycle commuting expenses will be subject to income tax but not wage withholding.
 - The Act repeals most of the rules governing deductions for entertainment, amusement or recreation that was **directly related to or associated with the active conduct of the taxpayer's trade or business**. **This rule applies to any amounts incurred or paid after December 31, 2017.**
 - The Act retains the 50% deduction for business-related food and beverage expenses, which it expands to include food and beverages provided to employees through an eating facility that meets the requirements for de minimis fringe benefits. **This 50% rule applies to amounts incurred or paid after December 31, 2017 and before January 1, 2026.**
 - The Act repeals the deduction for moving expenses, with a limited exception for members of the U.S. Armed Forces on active duty who move pursuant to a military order. **These rules take effect in 2018 and sunset in 2025.**

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Tax Cuts & Jobs Act: Impact on Benefits



• Qualified Plans:

- The Act provides relief from the early withdrawal penalty (10% penalty for a distribution prior to age 59.5) for up to \$100,000 of "qualified 2016 disaster distributions," which the Act defines as distributions from an eligible retirement plan made on or after January 1, 2016, and before January 1, 2018, to an individual whose principal place of residence at any time during calendar year 2016 was located in a 2016 disaster area and who has sustained an economic loss by reason of the events that gave rise to the Presidential disaster declaration.

Rather than being taxed currently, qualified 2016 disaster distributions are taxed ratably over 3 years, and the amount of the distribution can be recontributed to an eligible retirement plan within 3 years. The Act allows plans to be amended retroactively to take advantage of these rules.

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Tax Cuts & Jobs Act: Impact on Benefits



• Qualified Plans:

- Before the Act, an employee who terminated employment with an outstanding plan loan could avoid having the outstanding loan balance taxed to him or her if he or she rolled over the amount of the loan to an IRA or eligible retirement plan within 60 days. The Act enlarges this time period to the due date for filing the employee's tax return for that year (including extensions).

This provision applies to employees whose plans terminate or who separate from service while having a plan loan outstanding after December 31, 2017.

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Tax Cuts & Jobs Act: Impact on Benefits



• Qualified Plans:

- On February 9, 2018, Congress passed, and the President signed, the Bipartisan Budget Act of 2018. The Budget Act contained provisions affecting hardship distributions.
- The Budget Act relaxes the rules related to hardship withdrawals applicable to qualified defined contribution plans (and likely to 403(b) plans because the 403(b) regulations incorporate the 401(k) plans by reference), beginning with plan years commencing after December 31, 2018, in three significant ways:
 - First, the Budget Act eliminates the requirement that a participant exhaust the opportunity to take loans under the plan before receiving a hardship withdrawal.
 - Second, the Budget Act allows a participant to take a hardship withdrawal from the participant's elective deferral contributions, qualified nonelective contributions ("QNECs"), and qualified matching contributions ("QMACs"), as well as from earnings on each of those contribution sources. Prior to the Budget Act, a participant could take a hardship withdrawal from elective deferral contributions but not from QNECs or QMACs nor from earnings on any of those deferrals or contributions.
 - Third, the Budget Act directs the Secretary of the Treasury to modify existing 401(k) regulations to the remove the rule prohibiting participants from making elective deferrals and other employee contributions to the plan from which the hardship withdrawal was taken and any other plans maintained by the employer (which includes other qualified retirement plans, 403(b) plans, and nonqualified deferred compensation plans) during the six-month period after taking a hardship withdrawal.

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ACA Enforcement Today

Individual and Employer Mandate Obligations



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ACA Enforcement Today: IRS is taking steps



- Individual Mandate – individuals must have coverage or pay tax
 - Check box on 1040 tax return – **"Full Year Coverage"**
 - Some taxpayers are exempt (religious cost-share plans, tribal exemption, etc.)
 - [IRS Announcement](#) – individual returns will not be accepted if they do not indicate health coverage status (unlike 2016 silent returns)
- Employer Mandate –
 - Penalty assessments for 2015 are being issued – Letter 226J
 - Review and respond to challenge, if applicable, to avoid penalty: follow instructions for responding within 30 days.
 - Remember, penalty relief for good faith effort in 2015: coding errors forgiven

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Pay or Play (for 50+ EEs): Stay the Course



To avoid penalty, offer a group health plan:

- To at least 95% of full-time employees (130 hours) and their children up to age 26
- **That's Minimum Essential Coverage**; and **that's at least Minimum Value** (the plan's share of the total allowed cost of benefits is at least 60%); and
- **That's Affordable** which, for 2018, means the employee's self-only cost does not exceed 9.56% of household income; safe harbors are:
 - Federal Poverty level (FPL): $FPL \times 9.56\%/12$ to assess affordability ($\$12,060 \times 9.56\%/12$) = \$96.08 per month
 - Rate of Pay: (Hourly rate of pay x 130) 9.56% = Maximum amount to charge for employee only coverage.
 - W-2 Safe Harbor: **Use box 1 of employee's W-2 earnings**

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Employer Reporting Obligations Remain



Applicable Large Employers (ALE; 50+ FTEs)

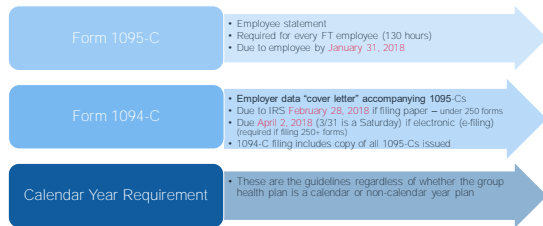
- Form 1095 must be created and filed for all full-time employees (130 hrs/month)
- Under 50 FTEs do not have to report (unless self-insured)**

All self-insured employers

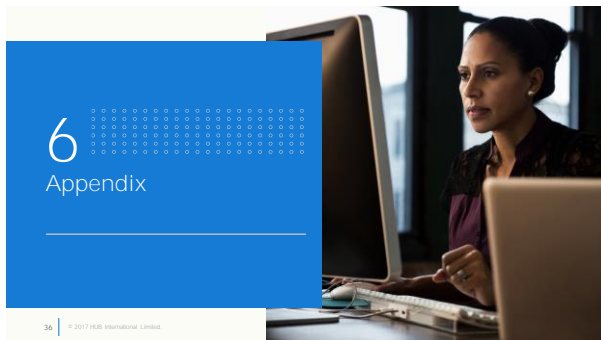


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Forms and Due Dates



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What is an Applicable Large Employer?



An ALE is an employer that employs, including members of any controlled group, an **average of at least 50 "full-time employees" (including full-time equivalent employees)** on business days during the preceding calendar year.

Step 1: Calculate the number of full-time employees (including seasonal workers) for each calendar month in the preceding calendar year.

Step 2: Calculate the number of full-time equivalents (employees who are not full-time, including seasonal workers) for each calendar month in the preceding calendar year. Do not include more than 120 hours of service for any employee. Divide the total hours of service by 120.

Step 3: Add the number of full-time employees and full-time equivalents obtained in Steps 1 and 2 for each month of the preceding calendar year.

Step 4: Add up the 12 monthly numbers from Step 3 and divide the sum by 12. This is the average number of full-time employees for the preceding calendar year.

Step 5: If the number obtained in Step 4 is less than 50, then the employer is not an ALE for the current calendar year. If the number obtained in Step 4 is 50 or greater and the employer included seasonal workers in Step 1 and/or Step 2, the employer may then apply a special rule to exclude the seasonal workers from the calculation.

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Controlled Group

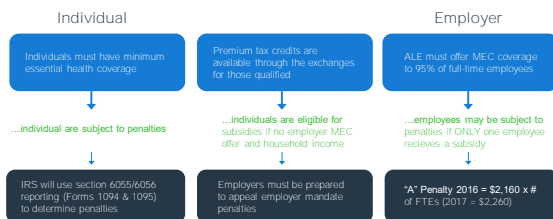


IRS Code Section 414(b) and (c)

- Parent Child
 - When one or more businesses are connected through specific percentage of stock ownership with a common parent corporation
- Sibling (Brother/Sister)
 - A group of two or more corporations, where five or fewer common owners own **directly or indirectly a "controlling interest" of each group and have "effective control"** based on specific stock/ownership interest
- Combination
 - A group consisting of three or more organizations that are organized in a specific manner set forth in the regulation

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Government Mandates



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Employer Mandate - cont.




Coverage offered must meet Minimum Value and be Affordable for employee:


MV coverage - is equivalent to bronze level plan on Exchange – covers approximately 60% of the costs of medical services incurred.

Affordable coverage – based on the lowest cost, employee-only, MV plan – 9.56% (2018) based on one of the three safe harbors:

- Rate of Pay: Hourly rate of pay x 130 or Salary for the month / the cost self-only coverage
- Federal Poverty level (FPL): **employee's monthly cost for self-only coverage** / FPL single/12
- W-2 Safe Harbor: Use box 1 of employee's W-2 earnings after the end of the year

"B" Penalty of \$3,390 imposed on an employer for each full-time employee who receives an Exchange subsidy in 2017 because employer coverage offered was not MV or affordable.





Questions?

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Thank you.

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