THE BENEFITS DEPARTMENT

A Boutique Law Firm with Practice Limited to Employee Benefits, Including Benefits Litigation

THE BENEFITS DEPARTMENT GUIDE TO

PPACA: ABSOLUTELY EVERY OPTION AVAILABLE TO EMPLOYERS IN RESPONSE TO THE EMPLOYER PENALTIES

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Hollis T. Hurd – hhurd@icloud.com
Universal Voice (412) 498-7484 · FAX (412) 429-1202
1597 Washington Pike, Suite B14 #147, Bridgeville, PA 15017-2899

Scan for website

Glossary

"FT30" means employees who are regularly scheduled to work 30 hours per week or more *or* in practice average 30 hours per week or more. These folks are sometimes called "actual full-time employees." We want to get the number 30 into the term so that you don't lapse back into thinking that full-time means 40 hours per week.

"FTE" means full-time equivalents. These are not particular employees but a figure calculated by summing the hours of employees who *don't* average 30 hours per week or more and then dividing by 30 hours per week. In other words, it expresses how many actual full-time employees you would have had if you used all actual full-time employees (at 30 hours per week).

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LIMIT THE NUMBER OF FT30+FTE TO 49
SO YOU'RE NOT SUBJECT TO THE PENALTIES AT ALL

Add up the number of FT30 employees (that is, the actual full-time employees) and FTE's for each month of the preceding year, in accordance with this scheme:

- For each calendar month of the preceding year,[1] write down the number of *actual full-time employees*, meaning those who worked an average of 30 hours per week or more during that month. (This calculation includes seasonal employees, but only for the months in which they averaged 30 hours per week or more.)

- For each calendar month of the preceding year, identify all *other* employees, calculate their hours worked during the month in question (but if any of them worked more than 120 hours during that month don't take into account more than 120 hours for them), sum those hours, and then divide by 120. That is the number of "full-time equivalents" for each month (include fractions at this stage).

- For all twelve calendar months of the preceding year, add up the number of actual full-time employees and the number of full-time equivalents for each month and then divide by 12. Ignore any final fraction at this stage (so, for example, 49.8 is just 49).

If the end result of that calculus is fewer than 50, relax; you're not subject to the employer penalties at all and need not engage in any avoidance maneuvers. All you have to do is be sure that you never exceed a total of 49 FT30 employees plus FTE's.

If the end result of that calculus is 50 or more (that is, an average of 50 or more actual full-time employees plus full-time equivalents per month), you are subject to the employer penalties. As an exception, if the only reason you exceeded 50 employees was because of seasonal employees, and you did so for no more than 120 days during a calendar year, you can ignore the seasonal employees and escape the penalty scheme.

If you are subject to the employer penalties, you have the option of reducing the number of FT30 and/or the number of hours worked by FTE so that the total of FT30 + FTE does not exceed 49. Given the math, this essentially means limiting your business to no more than 6,000 employee hours per month.

If you did not operate throughout the preceding year (such that dividing by 12 would not produce the right answer), then the rule is that you are subject to the penalties this year if both (a) you are *reasonably expected* to employ an average of 50 or more full-time employees (both actual full-time and full-time equivalents) and (b) *in fact you do* (which can only be judged at the end of the year).

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[1] This really means separately for each month; it is not an annual average.

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Limit the Number of FT30 Employees to 30 So the Penalty Is Zero In Any Event

If you have no more than 30 FT30 employees, then even if you are subject to the employer penalties (because of the number of FTE's), the penalty is zero. This is a result of a quirk in PPACA:

♦ The "availability" penalty is $2,000 times the number of your FT30 employees minus 30. Thus, if you have 30 or fewer FT30 employees, the number of employees used as the multiplier will be zero, and the penalty will be zero.

♦ The "affordability" penalty can never take into account any more employees than the "availability" penalty does. So even if you violate the "affordability" requirement, the penalty calculation will once again be zero.

Note that this does not necessarily reduce the number of hours worked at your business. It just requires you to substitute part-time schedules (under 30 hours per week) for full-time schedules (of 30 hours per week or more) so as to keep the number of FT30 employees under 30. Hey, airlines are required by law to monitor and limit the number of hours of their employees; there's no reason why you can't.

We expect that, in many businesses, cooperative sharing arrangements will be developed so that employees can work 40 hours a week or more—just not all for the same employer. For example, like union hiring halls, trade associations may operate "employee exchanges" where members of the association can find employees willing to work fewer than 30 hours a week because they have jobs with other members of the association that bring them to their desired total. The trade association would perform the function of monitoring hours and allocating employees among the members in order to assure that no employee averages more than 30 hours per week for any one member. This depends, of course, on the employees' services being more or less fungible.

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REORGANIZE YOUR CORPORATE STRUCTURE INTO MULTIPLE ENTITIES EACH OF WHICH IS UNDER THE LIMIT

If you have a single business entity now, you may break it up into separate business entities in order to get each of the resulting business entities under 50 FT30+FTE or under 30 FT's (either of which would eliminate the penalties, as just discussed). Likewise, if multiple business entities under common control are putting you over the limits, you may re-arrange the ownership to break the common control and test each business separately.

For this purpose, the government applies the "controlled group" rules that have long been applicable to qualified pension and profit sharing plans, as well as to withdrawal liability under multiemployer pension plans. The rules are complex and tricky; professional advice from a lawyer experienced in applying these particular rules is a must (do not rely on your accountant or a general business lawyer).

Breaking up common control requires relinquishing some control (obviously), and putting something in your spouse's name will not work. But where business partners can trust one another, and especially where you have adult children, it may very well be possible to break the controlled group with a sacrifice of control that you are willing to make.

For example, suppose that three individuals together own 100% of a business with three manufacturing sites. The number of FT30+FTE at each manufacturing site is 45. Suppose that the business provides employees with a small stipend that can be applied to health insurance but does not provide the level of coverage mandated by PPACA. As structured right now, the business is subject to the employer penalties under PPACA.

Now suppose that the business is broken into three companies which are separately incorporated and owned as follows:

	Company A	Company B	Company C
Owner #1	70%	15%	15%
Owner #2	15%	70%	15%
Owner #3	15%	15%	70%

Assuming that lots of additional, tricky rules are satisfied, a singular business that was subject to the employer penalties of PPACA is now three separate businesses none of which are subject to the employer penalties.

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HIRE VARIABLE-HOUR EMPLOYEES ON ONE-YEAR CONTRACTS

An employee who, upon hire, is reasonably expected to average 30 hours or more per week must be offered coverage shortly after hire in order to avoid the penalties. On the other hand, an employee who is not reasonably expected to average 30 hours or more per week—called a "variable-hour" employee by the government—need not be offered coverage unless and until the employee actually averages 30 hours or more per week during a testing period that can be as long as twelve months.

Therefore, if you use a twelve-month testing period for new variable-hour employees and hire all variable-hour employees on one-year contracts (no renewal), none of them need ever be offered health coverage and none of them will ever trigger the penalties. That is to say, by the time they will have completed the testing period and some of them will have proven to have worked an average of 30 hours per week or more, their one-year employment contracts will be up.[2]

And if you wait at least 26 weeks, you can hire the same employee again and do the same thing all over again *ad infinitem*.[3] That is because, according to the government, an employee who has a gap in employment with you of at least 26 weeks may be treated as an entirely new employee upon his or her return.

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[2] Completing an average of 30 hours per week or more during the testing period assures that the individual will wear the badge of "full-time" during the following coverage period. But it does not guarantee *employment* during the following coverage period.

[3] Trust me; it's not *ad infinitum*. I was a Latin and Greek major.

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OPEN YOUR EXISTING PLAN TO ALL FT30 EMPLOYEES AND CHARGE NO MORE THAN 9.5% FOR EMPLOYEE-ONLY COVERAGE

If you are subject to the employer penalties and have more than 30 FT30 employees, either or both of these penalties could apply:

- *Availability*. If you fail to offer coverage to even one FT30 employee, the penalty is $2,000 multiplied by the total number of your FT30 employees, *including all those to whom you do provide health coverage* (minus 30).

- *Affordability*. If you do make coverage available to all FT30 employees but the employee contribution for employee-only coverage is more than 9.5% of household income for any of them, the penalty is $3,000 multiplied by the number of FT30 employees for whom the employee contribution is more than 9.5% of household income. (This second penalty can never be more than $2,000 times the total number of FT30 employees minus 30.)

Obviously, you can avoid triggering the employer penalties by making coverage available to all FT30 employees and charging no more than 9.5% of household income for employee-only coverage.[4] This might be called the "compliance" option.

Note 1: Technically, the penalty is imposed only if an FT30 employee goes to an Exchange, purchases health insurance, and gets a subsidy from the federal government because you did not make "affordable" coverage "available" to him or her. But it would be foolish (and risky) to hope that no FT30 employee excluded from your plan or required to pay more than 9.5% of household income would go to an Exchange and get a subsidy.

Note 2: As for assuring that the employee contribution for employee-only coverage does not exceed 9.5% of household income, you may voluntarily limit the employee contribution to 9.5% of the employee's W-2 wages from you (which you know). Alternatively—and this method has been neither approved nor rejected by the government—you can set the employee contribution in dollars just as you do now but commit to reducing it to 9.5% of household income for any employee who can demonstrate that it exceeds 9.5% of his or her household income (such as by bringing in a tax return).[5]

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[4] This assumes that your regular plan or plans are at the "bronze" level or higher, as ranked by PPACA. Ordinary, standard employer plans are typically at the "gold" level, which is considerably above the bronze level, and even high-deductible health plans are at the bronze level, so we don't make a big point of this requirement.

[5] Shockingly, you do not have to worry about an employee getting a subsidy on an Exchange where the employee contribution for employee-only coverage is more than 9.5% of his wages from you but less than 9.5% of his total household income. The Exchanges will be given access to income tax information and will spontaneously deny the subsidy in that instance.

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KEEP YOUR GOLD PLAN INTACT
BUT OFFER A LOUSY BRONZE PLAN TOO--
JUST TO DEFEAT THE PENALTIES

PPACA rates group health plans as "bronze," "silver," "gold," or "platinum," depending on how much value they provide to the employee. Virtually all standard employer-provided group health plans rank as "gold" coverage.

But you don't have to offer "gold" coverage to avoid the penalties, only "bronze" coverage. So one option available to you is to keep your "gold" plan intact—the same participation requirements, the same benefits, and the same employee contributions—but make available a separate "bronze" plan just in order to avoid the employer penalties.

In this way, you could continue to provide the same coverage as now to the same classifications of employees as now and at the same cost as now. But for everyone else (or for the current group in case the current coverage doesn't meet the "affordability" requirement for some of them), you would make available a new plan at the "bronze" level that:

- has lousy benefits, because that's what a "bronze" plan has, and
- has high out-of-pocket costs, because that's what a "bronze" plan has, and
- charges 9.5% of household income for employee-only coverage plus the *full additional cost* for spouse and dependent coverage (because "affordability" is measured by the cost of employee-only coverage alone).

You may be familiar with high-deductible health plans (HDHP) coupled with employer contributions to a health savings account. This "bronze" plan would essentially be a HDHP but without any employer contributions to a health savings account.

As long as the lousy "bronze" plan is available to all FT30 employees, no penalties will be triggered, even if none of them can afford it and none of them choose to enroll.[6]

You may, however, be putting these employees in a difficult position, because the availability of your lousy "bronze" plan will prevent them from getting a subsidy on the Exchange. The employee may have coverage from some other source, such as through a working spouse (or if the rules for Exchanges ultimately permit a non-working spouse to cover the whole family and get a subsidy). But otherwise your lousy "bronze" plan may effectively be the only health coverage available to them, because they would have to pay full freight on the Exchange but only 9.5% of household income from you. And if they don't take it, they will have to pay the individual penalty.

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[6] We do not know at the moment whether insurance companies will be willing to offer "bronze" plans in these circumstances, where enrollment is not likely to satisfy their normal underwriting requirements. Self-funded employers will not have that concern, and self-funding just the bronze plan is always an option.

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Reduce the Cost of Compliance by Shifting from Full-Time to Part-Time

If you choose to avoid the penalties by providing group health coverage to all FT30 employees—the "compliance" method just discussed—you can at least reduce the cost of providing that group health coverage by reducing the number of FT30 employees who get it, such as to a relatively small core of employees who are expected to make careers at your company. As for the others, your HR scheduling system would be programmed to make sure that none of them ever got 30 hours per week. (This is the approach being taken by restaurant chains that have been much in the news lately, such as Papa John's pizza and the Darden restaurant group, according to the popular press.)

REDUCE THE PENALTY BY
REDUCING THE NUMBER OF FT30 EMPLOYEES

If you choose *not* to provide group health coverage to all FT30 employees (and therefore suffer the "availability" penalty of $2,000 times the number of your FT30 employees minus 30), at least you can minimize the number of FT30 employees and thereby minimize the penalty calculation. For example, if you can reduce the number of FT30 employees to 35, the "availability" penalty will be just $2,000 times 5 employees.

OUTSOURCE TO MINIMIZE FT30 EMPLOYEES

You can reduce the number of FT30 by outsourcing, rather than shifting the work to part-time employees. Perhaps you can outsource clerical services, janitorial services, accounting services, advertising or public relations services, payroll services, and so forth.

The marginal cost of outsourcing those functions would have to be weighed against the cost of either providing group health coverage or paying the employer penalties. And the savings may not be as much as hoped if the outsourcing company has enough employees that it must provide a plan or pay the penalty.

Beware of one particular scheme that the government plans to stamp out. In this scheme, you have all the same employees at work for 40 hours per week. The trick is that you employ them for 20 of those hours, and a temp agency employs them for the other 20 hours (supposedly). Thus, the employees do not count as full-time for either you or the temp agency, yet they function as full-time employees of yours. The government has announced that they consider such an arrangement an abuse of the rules and will do their best to stamp it out.

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USE MULTIPLE COMPANIES (UNDER COMMON CONTROL) TO LOCALIZE AND CONTAIN THE PENALTIES

Though all businesses under common control are considered a single employer for the purpose of testing to see whether the penalties apply at all (that is, whether the controlled group has 50 or more FT30+FTE), the "availability" penalty of $2,000 times the number of FT30 employees (minus 30) takes into account only employees of the direct employer. Putting all the employees to whom coverage is not available into one company will minimize the penalty.

An example will help here. Suppose there are five companies, each with 50 employees (for a total of 250 employees). Suppose they are all FT30 employees. Suppose that, at each company, there are 10 FT30 employees to whom coverage is not available. Each of the five companies will therefore incur the penalty of $2,000 times the number of their FT30 employees—for a total of $500,000 (250 FT30 employees times $2,000).

But if the 50 employees to whom coverage is not available were localized in just one of those companies, only that one company would be taken into account in computing the penalty, and the penalty would be only $100,000 (50 FT30 employees at that one company times $2,000).

For this purpose it makes no difference whether the companies are under common control, so there should be no obstacle to breaking them up. All you have to do is create a separate company—call it the "no benefits" company—and put all the employees who don't get health coverage in that company in order to localize and contain the penalty calculation.[7]

[7] This is a provision of the proposed regulations from January 2013 and is not guaranteed to remain in the final regulations.

IF YOU HAVE TO INCUR A PENALTY, MAKE SURE IT'S FOR "AFFORDABILITY," NOT "AVAILABILITY"

The $2,000 penalty for "availability" is calculated by reference to the total number of your FT30 employees, *including those who get coverage.* On the other hand, the $3,000 penalty for "affordability" is calculated by reference to only the number of employees for whom your coverage is unaffordable and who get a subsidy on the Exchange.

If the "affordability" penalty would be cheaper (as we suspect it usually will be), all you have to do is make coverage available to all FT30 employees but write into your plan that the employee contribution is 25% (or some other unattractive rate) for all those employees whom you don't want to cover and who qualify for a subsidy on the Exchange (which is all those with household incomes less than four times the federal poverty level). Because the plan is available to all FT30 employees, the "availability" penalty will not apply. Instead, only the "affordability" penalty will apply—the one that you prefer.

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HAVE "EMPLOYEES" INCORPORATE THEMSELVES AND THEN CONTRACT WITH THEIR CORPORATIONS[10]

A 2009 book promoted a concept called the "Protean Corporation." It means an organization with a core group of employees surrounded by a large cloud of resources with which it contracts to achieve its corporate goals. In most cases, those resources are corporations.

With respect to PPACA, the idea is to eliminate all but a core group of employees and then enter into contractual relations with other corporations for a variety of non-core services such as accounting, marketing, product development, manufacturing, information technology, public relations, finance, etc. The promoters of this idea note that the service providers must be corporations, so the employees who are jettisoned must form corporations and then contract with the protean corporation for their services.

The promoters understand that the IRS is hostile to the concept of independent contractors but hope that the idea can work if the former employees become corporations. For more information, please see *The Wall Street Journal*, January 29, 2013, page A13.

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[10] We do not endorse this approach or approve it from a legal standpoint. We include it only because this paper promises to identify absolutely every option, including all those we have heard suggested in the press.

ELIMINATE GROUP HEALTH COVERAGE

Of course, the ultimate way to deal with the employer penalties is to drop group health coverage entirely. That will trigger the penalties, of course, but you may find that the penalties are cheaper than paying for group health coverage. We believe this anomaly was deliberate: the drafters of PPACA want very much to get employers out of the picture. They want to herd everyone into the government-run Exchanges so that everyone is dependent on government for health care (the Exchanges are governmental entities). Then, at some future date, they can create a national single-payor health system simply by federalizing the Exchanges.

For employees, there is one big advantage to buying coverage on an Exchange—they can get an insurance policy that exactly suits their needs. Young people can get catastrophic coverage to keep the cost down. Older employees can get coverage for the ailments that they have or anticipate. Everyone can pick and choose to make sure they get a network that includes their current physicians. These are all choices not typically available in employer-provided coverage.

For employers, the math is compelling. Attached is a table showing various salary ranges, the subsidy available on an Exchange, what the employee would have to pay on the Exchange to replicate the employer's "gold" level plan, what the employer would pay to equalize the employee contribution as if the employee had stayed in the employer's plan (if it chose to do so), and what the employer would save nonetheless.

(Table on following page)

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Requests for legal advice are welcomed, however.*

Household Income	Monthly Subsidy on Exchange[11]	Monthly Premium on Exchange for Typical Gold Plan	Monthly Employee Cost on Exchange	Salary Adjustment to Equalize Employee Contribution[12]	Annual Savings to the Employer[13]
$25,000	$958	$1,312	$354	$0	$11,429
$30,000	$950	$1,312	$362	$2	$11,400
$35,000	$881	$1,312	$431	$71	$10,572
$40,000	$830	$1,312	$482	$122	$9,960
$45,000	$770	$1,312	$542	$182	$9,240
$50,000	$712	$1,312	$600	$240	$8,544
$55,000	$648	$1,312	$664	$304	$7,776
$60,000	$582	$1,312	$730	$370	$6,984
$65,000	$513	$1,312	$799	$439	$6,156
$70,000	$446	$1,312	$866	$506	$5,352
$75,000	$406	$1,312	$906	$546	$4,872
$80,000	$367	$1,312	$945	$585	$4,404
$85,000	$327	$1,312	$985	$625	$3,924
$90,000	$287	$1,312	$1,025	$665	$3,444
$92,199	$270	$1,312	$1,042	$682	$3,240
Above	$0	$1,312	$1,312	$952	$0

Assumptions
Household of four persons; family coverage.
2012 federal poverty level ($23,050).
Cost of second-cheapest "silver" plan on Exchange is $12,000 per year.
Cost of employer's typical "gold" level plan is $15,745 per year (Kaiser Family Foundation 2012 annual survey).
Employee contribution under employer's plan is $4,316 per year (Kaiser Family Foundation 2012 annual survey).

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[11] A calculated number under the regulations taking into account family size, household income, and the cost of the second-cheapest "silver" plan on the Exchange.

[12] A calculated number that enables the employee to get a "gold" plan on the Exchange like the employer's plan but pay no more than he or she would have paid as the employee contribution under the employer's plan.

[13] A calculated number equal to the employer's normal cost (*i.e.*, the cost of the employer's "gold" plan less the employee contribution), less the salary adjustment needed to equalize the employee contribution on the Exchange.