# “Play or Pay”
# Under the Affordable Care Act

J. Clark Pendergrass, J.D.

**Lanier Ford Shaver & Payne P.C.**

2101 W. Clinton Ave., Ste. 102
Huntsville, AL 35805
256-535-1100
JCP@LanierFord.com

**www.LanierFord.com**



LANIER FORD

# Topics

- Employer mandate – “Play or Pay”
- Exchanges and exchange notice requirements
- Employer reporting requirements
- Small business tax credit
- Employer safe harbors

LANIER FORD

# Effective Date of Employer Mandate

- Original effective date:  1/1/2014

- New effective date:  1/1/2015
  - In July 2013, Administration issued notice of delay until 1/1/2015.

- Penalties effective date:  1/1/2016

LANIER FORD

# “Play or Pay” Is Here to Stay

- On July 11, 2013, the U.S. Court of Appeals for the Fourth Circuit in *Liberty University, Inc. v. Lew*, upheld the employer mandate. U.S. Supreme Court denied petition for certiorari on Dec. 2, 2013.
- But employer mandate has been delayed until 2015. No mandate in 2014, and no penalty in 2015.

LANIER FORD

# Employer Mandate: Overview

- **Employer Mandate:** An **applicable large employer** is liable for a shared responsibility payment (i.e., penalty) in any calendar month that it—
  - Fails to offer "minimum essential coverage" (MEC) under an eligible employer-sponsored plan to at least 95% of its full-time employees OR
  - Offers MEC but it is unaffordable or does not provide the required minimum value (MV) AND
  - At least one of the employer's full-time employees receives a premium tax credit for purchasing health insurance through an Exchange.

LANIER FORD

# Who Is an Applicable Large Employer?

- Any employer who employed on average at least 50 full-time employees (including "full-time equivalent employees" or FTEEs) for more than 120 days during the preceding calendar year.

- Employer includes all governmental entities (federal, state, local or Indian tribal) and non-profits.

LANIER FORD

# Who Is an Employee?

- Common-law standard applies in determining who is an employee.
  - Right-to-control test.
  - Employee is subject to the will and control of the employer not only as to what shall be done (the result) but also how it shall be done (i.e., the details, means, methods, etc.).
  - Not necessary that employer exercise right to control, so long as has the right to control.
  - Do not count sole proprietors (self-employed persons), partners in partnerships, shareholders of S Corporations who own 2% or more of the shares of capital stock, employees working outside of U.S. and leased employees.  Spouses, family members and dependents of such persons not counted as well.

LANIER FORD

# 50 Employees Threshold

- Full-time employees (FTEs):
  - Employee who performs at least 30 hours of service a week (includes not only hours worked but also hours for which the employee is paid or entitled to payment even though no work is performed, such as vacation, PTO, jury duty, military duty, disability or leaves of absence); OR
  - Employee who performs 130 hours of service in a calendar month (which is 1,560 annually).

LANIER FORD

# 50 Employees Threshold

- Full-time equivalent employees (FTEEs):
  - 1 FTEE = monthly hours worked by all part-time employees/120
  - For example:  12 PTEs who each work 20 hrs. per month = 2 FTEEs (12 x 20 = 240; 240/120 = 2)
- FTEEs are calculated solely for purposes of determining whether an applicable large employer, but only FTEs count for purposes of determining the penalty.
  - Employers are not required to provide coverage for part-time employees.

LANIER FORD

# Aggregation Rules

- For purposes of counting the number of FTEs and FTEEs, IRC aggregation rules apply.
- All entities treated as a single employer under Sections 414(b), (c), (m) or (o) are treated as a single employer.
- Thus, all employees of a controlled group under Section 414(b) or (c) are counted.
- Thus, all employees of an affiliated service group under Section 414(m) are counted.

LANIER FORD

# Aggregation Rules

- No aggregation for purposes of calculating penalty.
- Employer-by-employer basis:  Penalty is computed and assessed separately for each applicable large employer member, taking into account that member's offer of MEC or lack thereof and based on that member's number of FTEs.

LANIER FORD

# Example

- Parent corporation has 20 wholly-owned subsidiaries.
- Controlled group is an applicable large employer.
- Each of the 21 members (parents and subs) is considered separately.
- Each of the 21 members is liable for its own penalty payment.

# Determination of whether you are an applicable large employer?

- For each month of 2014, do each of the following:
  - Add the number of FTEs in a month.
  - Add the number of hours worked by all FTEEs in that same month and then divide that total by 120. Fractions count in this calculation.
  - Add the 2 above numbers. Fractions count in this calculation.
  - Repeat the above 3 steps for every month of 2013.
  - Combine the 12 monthly totals and divide by 12 to yield monthly average. The monthly average represents the number of FTEs and FTEEs for 2014.

LANIER FORD

# Rounding Rule

- If the monthly total number of FTEs and FTEEs is not a whole number, then it is rounded **down** to the next lowest whole number.
- Fractions DO NOT count for purposes of 50-employee threshold. For example, 49.9 FTEs and FTEEs is treated as 49 and thus not applicable large employer.

LANIER FORD

# Minimum Essential Coverage

- The term is essentially meaningless, because there is no definition.  Instead, MEC is defined by what it is not.

# MEC—What It Is Not

- Coverage only for accident or disability income insurance or any combination thereof.
- Coverage issued as a supplement to liability insurance.
- Liability insurance, including general liability insurance and automobile liability insurance.
- Workers' compensation insurance.
- Automobile medical payment insurance.
- Credit-only insurance.
- Coverage for on-site medical clinics.

LANIER FORD

# MEC—What It Is Not (cont.)

- Other similar insurance coverage under which benefits for medical care are secondary or incidental to other insurance benefits.
- Any of the following if provided under a separate policy, certificate or contract:
  - Limited-scope dental or vision benefits.
  - Benefits for LTC, nursing home care, home health care, community-based care or any combination thereof.
  - Coverage only for a specified disease or illness.
  - Hospital indemnity or other fixed indemnity insurance.
  - Medicare supplemental health insurance.
  - TRICARE supplemental health insurance.
  - Supplemental coverage under a group health plan.

LANIER FORD

# Minimum Essential Coverage

- MEC includes any coverage under an **eligible-employer - sponsored plan.**
- Eligible-employer-sponsored plans include governmental plans, church plans, grandfathered plans, and other group health plans offered in the small or large group market in a state.
- A group health plan is a plan established or maintained by an employer for its employees and their dependents.
- **Bottom line for employers:** Any health insurance plan that is legally sold in a state counts as an eligible-employer-sponsored plan.

LANIER FORD

# Dependents

- Dependents includes a son or daughter (whether by blood or adoption), a stepson or stepdaughter, and an eligible foster child—any of whom has not reached the age of 26.
- Does not include any other individuals even if such individuals are considered tax dependents of the employee.
- Does not include employee's spouse, so plan can exclude spouses, include a spousal surcharge or include a working-spouse rule.
- Employer is entitled to rely upon employee's representation regarding children.

LANIER FORD

# Essential Health Benefits

- Don’t confuse “essential health benefits” with “minimum essential coverage”; terms are distinct and different.
- MEC is a term that describes those types of coverages that qualify for purposes of the individual mandate and employer mandate.
- EHB is a set of covered services that certain types of plans must include beginning 1/1/14. A plan does not necessarily have to include EHB to qualify as MEC.
- MEC applies to employer; EHB applies to plans.

LANIER FORD

# Essential Health Benefits

- Beginning 1/1/14, only **non-grandfathered** health plans offered in the **individual** and **small group markets** (inside and outside of the Exchanges) must cover EHB.
- PPACA defines the small group market as those groups with up to 100 employees. However, in 2014 and 2015, states have the option to define small group market as up to 50 employees.
- Beginning 1/1/16, PPACA expands definition of small group market to groups with up to 100 employees; applies to all states and all Exchanges.

LANIER FORD

# Essential Health Benefits

- **Self-insured**, **large group market (self or fully-insured)** and **grand-fathered** plans are NOT required to cover EHB in order to satisfy MEC.
- In other words, employer-sponsored self-insured or fully-insured large group plans are not required to provide EHB. So, for example, an employer with a large group market plan could elect to provide coverage for none, some or all EHBs.
- PPACA defines the large group market as those groups with more than 100 employees. However, states have the option in 2014 and 2105 to define large group market as more than 50 employees.
- In addition, beginning 1/1/17, states have the option of allowing large group market plans to be offered in the state's Exchange. If a state does so, then the large group market plan is subject to the same regulations as individual and small group market plans and must cover EHB.

LANIER FORD

# Essential Health Benefits (EHB)

- Ten Mandated Categories:
  - Ambulatory patient services;
  - Emergency services;
  - Hospitalization;
  - Maternity and newborn care;
  - Mental health and substance abuse disorder services, including behavioral health treatment;
  - Prescription drugs;
  - Rehabilitative and habilitative services and devices;
  - Laboratory services;
  - Preventative and wellness services and chronic disease management; and
  - Pediatric services, including oral and vision care

LANIER FORD

# Essential Health Benefits

- Those subject health plans must offer benefits that are **substantially equal** to the benefits of the state-selected benefits of the state-selected benchmark plan, as modified, to satisfy the requirements of EHB-benchmark plan.

# Essential Health Benefits

- States may define EHB by selecting benchmark plan from one of the following benchmark health insurance plan options:
  - The largest plan by enrollment in any of the state's 3 largest small group insurance products;
  - Any one of the 3 largest state employee health plans by enrollment;
  - Any one of the 3 largest national federal employee health plans by enrollment; or
  - The largest non-Medicaid HMO plan offered in the state's commercial market by enrollment.

LANIER FORD

# Alabama EHB

- Alabama used the first option and selected Blue Cross Blue Shield of Alabama 320 Plan as EHB-benchmark Plan.
- HHS has released list of EHB-benchmark plans for each state, including D.C. and each territory. See Appendix A:  List of Essential Health Benefits Benchmarks, 78 Fed. Reg. 12834, 12869 (Feb. 25, 2013).

LANIER FORD

# Minimum Value:  General Rules

- An eligible-employer-sponsored plan must provide adequate coverage – that is, MV.
- MV is the minimum actuarial value (AV) that a plan must provide.

# Actuarial Value

- AV is a measure of a plan's generosity.
- AV is the percentage of total allowed costs paid by the plan, as opposed to the percentage paid by the participant.

# Actuarial Value

- Non-grandfathered plans in the individual and small group markets (outside or inside the Exchange) must meet specified AVs.
- The minimum AV for these plans is 60%.
- These actuarial values are referred to as the metal levels.
- Note: Non-grandfathered plans in the individual and small group markets must provide EHB.

# “Metal” Levels of Coverage

- **Bronze:** designed to cover 60% of the full actuarial value of the plan benefits.
- **Silver:** designed to cover 70% of the full actuarial value of the plan benefits.
- **Gold:** designed to cover 80% of the full actuarial value of the plan benefits.
- **Platinum:** designed to cover 90% of the full actuarial value of the plan benefits.

LANIER FORD

# Calculation of AV

- The total expected payments by the plan for EHB, adjusted for the plan's cost-sharing rules, i.e., deductibles, co-insurance, co-payments, out-of-pocket limits, for a standard population; divided by
- The total costs for the EHB that the standard population is expected to incur, rather than the population that a plan actually covers.
- So for 60% AV or Bronze Level, this means that the plan pays on average at least 60% of the total cost of allowed benefits under the plan and the employee pays, via deductibles, co-insurance, co-payments and other out-of-pocket amounts, on average no more than 40% of the total costs of allowed benefits.
- HHS permits a de minimis variation of plus or minus 2%, e.g., a bronze plan could have an actuarial value between 58% and 62%.

LANIER FORD

# Minimum Value

- MV is the 60% actuarial value level.
- Self-insured and large group market (self- or fully-insured) plans are not required to meet metal levels, but they must provide at least 60% AV.
- So these plan provides MV if the plan pays at least 60% of the total allowed costs of benefits under employee single-plan coverage (that is, its AV is at least 60%).
- Note:  Grandfathered plans are not required to provide MV.

# Minimum Value

- Four Methods:
  - Use calculators;
  - Use safe harbors;
  - Use actuarial certification; or
  - Use metal coverage levels – for plans in the small group market

LANIER FORD

# Calculators

- MV Calculator or AV Calculator at http://www.cms.gov/cciio/resources/regulations-and-guidance/index.html
- Use AV Calculator for non-grandfathered plans in the individual and small group markets.
- Use MV Calculator for self-insured and large group market (self- or fully-insured) plans.

LANIER FORD

# Safe Harbors

- Use one of the safe harbors established by HHS and IRS:
  - A plan with a $3,500 medical and drug deductible, 80% plan cost-sharing, and a $6,000 maximum out-of-pocket limit for employee cost-sharing;
  - A plan with a $4,500 medical and drug deductible, 70% plan cost-sharing, a $6,400 maximum out-of-pocket limit, and a $500 employer contribution to an HSA; and
  - A plan with a $3,500 medical deductible, $0 drug deductible, 60% plan medical expense cost-sharing, a $6,400 maximum out-of-pocket limit and drug co-pays of $10/$20/$50 for the first, second and third prescription drug tiers with 75% co-insurance for specialty drugs.
- For plans with nonstandard features that are incompatible with the MV calculator or a safe harbor, use an actuarial certification from a member of the American Academy of Actuaries.

LANIER FORD

# Actuarial Certification

- For plans with nonstandard features that are incompatible with the MV calculator or a safe harbor, use an actuarial certification from a member of the American Academy of Actuaries.

# Small Group Market Plans

- Conform with the requirements of any of the four levels of metal coverage:
  - bronze,
  - silver,
  - gold or
  - platinum.

LANIER FORD

# Affordability: General Rule

- To be affordable, the employee's required contribution for the annual premium for self-only coverage of employer's lowest cost MV coverage must not exceed 9.5% of employee's household income for that calendar year.
  - The 9.5% figure will be indexed to reflect the extent that insurance premiums rise faster than income and consumer prices.
- Safe harbors will be discussed later.

LANIER FORD

# The Penalty

- Two types of penalties:  Type A and Type B
  - Type A:  Large Employer Does Not Offer Coverage
  - Type B:  Large Employer Offers Coverage
- Penalty is NOT tax deductible.
- Employer cannot be liable for BOTH penalties – Type A and Type B – for the same calendar month.
- No penalty if employee fails to pay insurance premium and is dropped from coverage.  Employer is not required to provide coverage for the unpaid period and the employer is treated as having offered coverage for the remaining period.

LANIER FORD

# The Penalty

- Only liable for penalty if at least one FTE obtains coverage through Exchange and receives premium tax credit.
- FTEEs and PTEs not included in penalty calculations.
- No penalty if employee fails to pay insurance premium and is dropped from coverage. Employer is not required to provide coverage for the unpaid period and the employer is treated as having offered coverage for the remaining period.

LANIER FORD

# Calculation of Type A Penalty

- For each calendar month, the monthly penalty is equal to: 1/12 x $2,000 x (Number of FTEs – 30).
- For example, an applicable large employer has 100 FTEs but fails to offer coverage to substantially all of its FTEs and one FTE receives a premium tax credit for purchasing health insurance through an Exchange for one month in 2015. Penalty A is 1/12 x $2,000 x (100 – 30) = $11,667 for that month.

LANIER FORD

# Calculation of Type B Penalty

- For each calendar month, the monthly penalty is the lesser of:
  - (A) 1/12 x $3,000 x Number of FTEs receiving a tax credit; OR
  - (B) 1/12 x $2,000 x (Number of FTEs – 30).
- In most cases, the lesser will be (A).

# Do The Math

- Average employer's annual contribution for family health coverage would be $11,429.
- Penalty A (no coverage provided): $2,000 per FTE, excluding first 30 FTEs.
- Example: Employer with 50 FTEs. 1 FTE receives credit. (50 – 30) x $2,000 = $40,000 total annual penalty.
- Compare: $11,429 x 50 = $571,450.

LANIER FORD

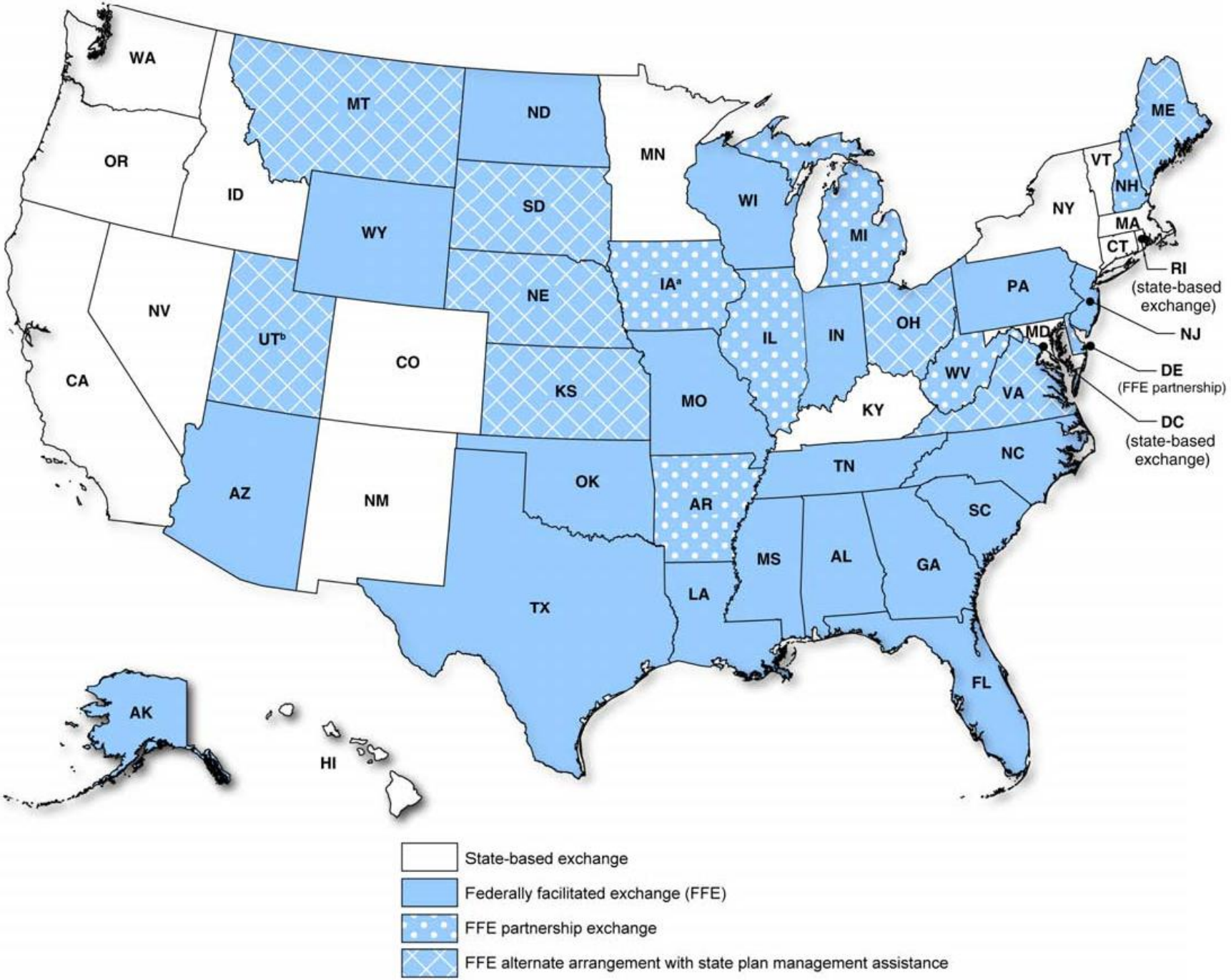
# Potential Penalties for Large Employers

| Not a large employer: Less than 50 full-time equivalent employees | Large employer: 50 or more full-time equivalent employees | | | |
|---|---|---|---|---|
| | Does not offer coverage | | Offers coverage | |
| | No full time employees receive credits for exchange coverage | 1 or more full-time employees receive credits for exchange coverage | No full time employees receive credits for exchange coverage | 1 or more full-time employees receive credits for exchange coverage |
| No Penalty | No penalty | Number of full-time employees minus 30 multiplied by $2,000.<br><br>(Penalty is $0 if employer has 30 or fewer full-time employees.) | No penalty | Lesser of:<br>• Number of full-time employees minus 30, multiplied by $2,000.<br>• Number of full-time employees who receive credits or exchange coverage multiplied by $3,000.<br><br>(Penalty is $0 if employer has 30 or fewer full-time employees – because penalty is based on the lesser of the two calculations.) |

# Exchanges

- Open enrollment for health insurance coverage through exchanges began 10/1/2013.
- As of most recent GAO report:
  - Thirty-four states will not operate state-based health insurance exchanges; in these 34 states, CMS will operate federally facilitated health insurance exchanges.  Alabama is one of 34.
  - Sixteen and District of Columbia will operate state-based health insurance exchanges.

LANIER FORD


WA
OR
CA
ID
NV
MT
WY
UT[b]
AZ
CO
NM
ND
SD
NE
KS
OK
TX
MN
IA[a]
MO
AR
LA
WI
IL
MS
MI
IN
KY
TN
AL
OH
WV
GA
FL
SC
NC
VA
PA
NY
MD
DE
NJ
CT
RI
MA
VT
NH
ME
AK
HI
RI (state-based exchange)
NJ
DE (FFE partnership)
DC (state-based exchange)
State-based exchange
Federally facilitated exchange (FFE)
FFE partnership exchange
FFE alternate arrangement with state plan management assistance

# Important Date

- October 1, 2013
  - Must notify in writing all current employees and any employees hired after this date, within 14 days of being hired, of the existence of the insurance marketplace/exchange.
  - This notice requirement applies to **ALL** employers and not just “large employers.”

# Exchange Notice Requirements

- Employers subject to exchange notice requirement:
  - Any employer subject to FLSA
  - FLSA applies to any employer that employs one or more employees who are engaged in, or produce goods for, interstate commerce.
  - Generally, any employer that has not less than $500,000 in annual dollar volume of business is subject to FLSA.

LANIER FORD

# Exchange Notice Requirements

- Providing exchange notice to employees.
- Employers must provide a notice of coverage options to each employee, regardless of plan enrollment or of part-time or full-time status.
  - Employers are not required to provide a separate notice to dependents or other individuals who are or may become eligible for coverage under the plan but who are not employees.

LANIER FORD

# Exchange Notice Requirements

- Inform the employee of the existence of the exchange (or marketplace), including a description of the services provided by the exchange, and the manner in which the employee may contact the exchange to request assistance.
- Explain that employee may be eligible for a premium tax credit if the employee purchases a qualified plan through the exchange and the employer's plan does not meet the MV requirement.
- Explain that if the employee purchases a plan through the exchange, then the employee may lose the employer contribution (if any) to any health plan offered by the employer and that all or a portion of the such contribution may be excludable from income for federal income tax purposes.

LANIER FORD

# Exchange Reporting Requirements

- DOL has published model exchange notices:
  - For employers who do not offer a plan: http://www.dol/ebsa/pdf/FLSAwithoutplans.pdf
  - For employers who do offer a plan: http://www.dol/ebsa/pdf/FLSAwithplans.pdf
  - Notice must be provided in writing.
  - Must be written in a manner calculated to be understood by the average employee.

LANIER FORD

# Exchange Reporting Requirements

- Timing of exchange notices:
  - **New Hires:** Employers must provide the Exchange Notice to each new employee at the time of hiring beginning 10/1/2013. Beginning 1/1/2014, employers may provide exchange notice to new hire within 14 days of employee's start date.
  - **Current Employees:** For employees who are current employees before 10/1/2013, employers must provide exchange notice no later than 10/1/2013.

LANIER FORD

# Exchange Reporting Requirements

- Delivery of exchange notice:
  - Notice must be provided automatically and free of charge.  Employee does not have to request.
  - May be provided by first-class mail.
  - May be provided electronically if DOL's electronic safe-harbor requirements are met:
    - To employees have work-related access to computer and
    - To other plan participants and beneficiaries who consent to receive disclosures electronically.

LANIER FORD

# Exchange Reporting Requirements

- Delivery Continued:
  - Safe-harbor does not require the use of any specific form of electronic media. For example, e-mail sent directly to employee.
  - However, must use measures reasonably calculated to ensure actual receipt of the notice by the employee. Merely posting exchange notice of the company's website or intranet available to employees will not by itself satisfy safe-harbor requirement.

LANIER FORD

# Employer Reporting Requirements

- Informational return requirement.
  - TRANSITIONAL RELIEF.
    - IRS has delayed until 2015.
    - Optional for 2014: IRS encourages employers "to voluntarily comply with [the] information reporting provisions for 2014 (once the information reporting rules have been issued) in preparation for the full application of the provisions for 2015."
  - Beginning the year 2015, applicable large employers (fully-insured) must file an annual report with IRS.
  - Rules have yet to be published. IRS states that proposed rules are expected to be published this summer.
  - Use IRS Form 6056 (Required by 26 U.S.C. § 6056).
  - Use IRS Form 6055 for self-funded employers.

LANIER FORD

# Info Required on Form 6056

- Employer information
  - Name
  - Employer identification number (EIN).
- Date the return is filed.

# Info Required on Form 6056 (cont.)

- **Certification of medical coverage offering:** Certify whether the applicable large employer offers its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan (as defined in § 5000A(f)(2)) and, if so, certify—
  1. The duration of any waiting period (as defined in § 6056(b)(2)(C)) with respect to such coverage;
  2. The months during the calendar year when coverage under the plan was available;
  3. The monthly premium for the lowest cost option in each enrollment category under the plan; and
  4. The employer's share of the total allowed costs of benefits provided under the plan.

LANIER FORD

# **Info Required on Form 6056** (cont.)

- Employee information
  - Number of full-time employees for each month of the calendar year
  - For each full-time employee, the name, address, and taxpayer identification number (TIN) of the employee and the months (if any) during which the full-time employee (or any dependents) were covered under the eligible employer-sponsored plan; and

LANIER FORD

# Info Required on Form 6056 (cont.)

- Employer information
  - Name
  - Employer identification number (EIN).
- Date the return is filed.
- Certification of medical coverage offering
  - Certify whether the applicable large employer offers its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan (as defined in § 5000A(f)(2)) and, if so, certify
    1. The duration of any waiting period (as defined in § 6056(b)(2)(C)) with respect to such coverage;
    2. The months during the calendar year when coverage under the plan was available;
    3. The monthly premium for the lowest cost option in each enrollment category under the plan; and
    4. The employer's share of the total allowed costs of benefits provided under the plan.

LANIER FORD

# “Nuts and Bolts” of Enforcement

- Because an employer typically will not know whether an FTE received a premium tax credit, the employer will not have all of the information needed to determine whether it owes a penalty.
- After IRS has received Forms 6056 from applicable large employers and information about employees claiming premium tax credit, the IRS will determine whether any of the employer’s FTEs received the premium tax credit and if so, whether a penalty is due.

LANIER FORD

# “Nuts and Bolts” of Enforcement

- If IRS determines that an employer owes a penalty, then IRS will contact employer to inform it of its potential liability and provide it an opportunity to respond before any liability is assessed or notice and demand for payment is made.
- The contact for a given calendar year will not occur until after employees’ individual tax returns are due for that year claiming premium tax credits and after the due day for employers that meet the 50 FTEEs threshold to file information returns identifying their FTEs and describing the coverage they offer, if any.

LANIER FORD

# “Nuts and Bolts” of Enforcement

- If it is determined that an employer is liable for penalty after the employer has responded to the initial IRS contact, the IRS will send a notice and demand for payment.
- Notice will instruct the employer on how to make the payment.
- Employers will not be required to include the penalty payment on any tax return that they file.

LANIER FORD

# Small Business Tax Credit

- A qualified small business employer may claim a tax credit for nonelective contributions to purchase health insurance for its employees
- Coverage must be purchased through SHOP Exchange.
- Must obtain eligibility determination from the SHOP Exchange.

LANIER FORD

# Small Business Tax Credit

- A small business is eligible if it—
  - Provides health insurance coverage to its employees.
  - Has no more than 25 FTEEs for the taxable year.
  - Pays average annual wages of no more than $50,000 per FTEE for 2010 through 2013 (adjusted for inflation beginning in 2014).
  - Has a contribution arrangement through which it pays at least half of the insurance premiums for its employees at the employee-only coverage rate.

# Employer Safe Harbors

- 2014 Transition Relief*
- Affordability safe harbors
- Look back/stability safe-harbor

LANIER FORD

# Transition Relief

- For purposes of determining whether applicable large employer in calendar year 2015, an employer may use a period of 6 consecutive calendar months in 2015 instead of the entire 2015 year.
- Employer can select when this 6-month period begins.

# Transition Relief

- Solely for purposes of the stability period beginning in 2015 for determining FTE status, employers may use a look-back measurement period that is shorter than 12 months even if it plans on using a 12-month look-back measurement period going forward.
- This short, transition look-back measurement period must be at least 6 months long, must begin no later than July 1, 2015, and end no earlier than 90 days before the first day of the 2015 plan year.

LANIER FORD

# Transition Relief

- Large employers with off-calendar year plans as of December 27, 2012, can wait until the first day of the 2015 plan year to offer affordable, MEC without being assessed a penalty for the months in 2015 preceding the start of their plan year.
- To help these plan synchronize with the 1/1/2015 effective date, these employers may permit certain mid-year election changes for health coverage in 2014. These changes would require a cafeteria-plan amendment by 12/31/2014.

LANIER FORD

# Transition Relief

- Employer contributions to multi-employer plan coverage can satisfy mandate.
- An employer will not be treated as failing to offer coverage if (1) the employer contributes to a multiemployer plan for FTEs pursuant to a collective bargaining agreement or participation agreement; (2) coverage under the multi-employer plan is offered to FTEs and their dependents; and (3) the coverage is affordable and provides MV.

LANIER FORD

# Affordability Safe Harbors

- Reminder:
  - Coverage is “affordable” if it doesn’t exceed 9.5% of FTE’s **household** income.
- Problem:
  - Not every employer will have access to household income.
- Solution:
  - Regulatory safe harbors.

LANIER FORD

# Affordability Safe Harbors

- Three Different Options:
  - W-2 wages
  - Rate of pay
  - Federal poverty line
- Note:
  - Adhering to the safe harbors will not always mean that the employer is in compliance with the 9.5% statutory requirement; **HOWEVER,** adherence to Safe Harbors will prevent tax penalties under PPACA.

LANIER FORD

# W-2 Wages Safe Harbor

- Requirements
  1. Lowest-cost self-only coverage option provides minimum value during the whole year.
     - Can be applied pro rata for employees who worked less than a year.
     - Any month with one day of coverage is counted.
  2. This option does not exceed 9.5% of the employee's W-2 wages contained in Box 1.
  3. That the employee's required contribution to this plan remained a consistent amount or percentage of all Form W-2 wages during the calendar year.
  4. That the employer did not make discretionary adjustments to the required employee contribution for any pay period.

LANIER FORD

# W-2 Wages Safe Harbor

- Example:
  - John's W-2 Box 1 wages for 2015 are $60,000. What is the maximum payment John can be required to pay in order for the lowest-cost self-only option to be affordable?
    - Monthly salary = $60,000 / 12 months = $5,000 per month.
    - Cap is 9.5% of $5,000 or $475 per month.

LANIER FORD

# Rate-of-Pay Safe Harbor

- Requirements:
  1. Lowest-cost self-only coverage option provides minimum value;
  2. That this option does not exceed 9.5% of the employee's monthly wages calculated as follows:
     a. **For hourly employees:**

        Monthly wages are calculated as "130 hours multiplied by the employee's hourly rate of pay as of the first day of the coverage period (generally the first day of the plan year)."

     b. **For salaried employees:**

        "Monthly salary is used instead of 130 multiplied by the hourly rate of pay, and, . . . an applicable large employer . . . may use any reasonable method for converting payroll periods to monthly salary."
  3. Employer may not reduce hourly employees' hourly wage or its salaried employees' monthly wages during the calendar year.

LANIER FORD

# Monthly Wages Safe Harbor

- Example 1:
  - Mike is paid at a rate of $12 per hour. What is the maximum he may pay under the monthly wage safe harbor?
    - $12/hour times 130 hours = $1560
    - Cap is 9.5% of $1560 or $148.20
- Example 2:
  - Mike now earns a biweekly salary of $1000.
    - Monthly salary is $1000 times 26 pay periods divided by 12 months = $2166.67 per month
    - Cap is 9.5% of $2166.67 or $205.83

LANIER FORD

# Federal Poverty Line Safe Harbors

- Requirements:
  1. Lowest-cost self-only coverage option provides minimum value during the whole year.
  2. That this option's monthly cost does not exceed 9.5% of the federal poverty line for a single individual for a calendar year divided by 12.
     - For example, if the federal poverty line for a single individual is $12,000 per year, the option must not exceed 9.5% of $1,000 or $95 dollars.
- Note: Like the rate-of-pay safe harbor, this safe harbor does not consider the actual number of hours worked.

LANIER FORD

# Defining Full-Time Employees

- To reiterate:
  - Only FTEs must be covered under PPACA.

- Safe Harbor
  - Look-Back/Stability Period – an optional method that an employer may use to determine whether an employee is a FTE

# Hours of Service

- Unit of measurement is **hour of service.**
  - Not equivalent to hours worked under FLSA.
- Hourly Employees
  - Hour of service means “each hour for which an employee is paid, or entitled to payment, for the performance of duties for the employer; and each hour for which an employee is paid, or entitled to payment by the employer for a period of time during **which no duties are performed** due to vacation, holiday, illness, incapacity (including disability), layoff, jury duty, military duty or leave of absence.”

LANIER FORD

# Hours of Service

- Non-Hourly Employees
  - Three methods:
    1. Use the method for hourly employees.
    2. Days-worked equivalency—for each day with 1 hour of service, credited with 8 hours.
    3. Weeks-worked equivalency—for each week with one hour of service, credited with 40 hours.
  - Must use same method for each employee in a particular classification.
    - Must use same system for each calendar year.

# Look-Back/Stability Period Safe Harbor

- Uses:
  - Ongoing employees
  - New employees
  - Seasonal employees
    - An employee who performs labor or services on a seasonable basis, for example, retail workers employed exclusively during holiday seasons
  - Variable hour employees
    - A new employee is a variable hour employee if, based upon the facts and circumstances at the start date, it cannot be determined that the employee is reasonably expected to work on average at least 30 hours per week.

LANIER FORD

# Ongoing Employees

- Employer chooses a period of time in which to measure – period referred to as “standard measurement period”
- Ongoing employee is an employee who has been employed by the employer for at least one complete standard measurement period

# Ongoing Employees

- Standard measurement period
  - Employer determines each ongoing employee's full-time status by looking back at the standard measurement period
  - Standard measurement period can be not less than 3 months but not more than 12 consecutive months.
  - Duration (between 3 or 12 months) and start and end dates chosen by employer.
  - Must be applied on a uniform and consistent basis for all employees in same classification.
  - Permissible employee classifications:
    1. Collectively bargained employees or non-collectively bargained employees;
    2. Salaried employees and hourly employees;
    3. Employees of different entities; and
    4. Employees located in different states.

LANIER FORD

# Ongoing Employees

- If employer determines that an employee averaged at least 30 hours per week during the standard measurement period, then employer must treat the employee as a FTE employee during the subsequent “stability period” and be offered coverage.
- Employee remains FTE regardless of number of hours of service during the subsequent stability period so long as he or she remains an employee.

LANIER FORD

# Ongoing Employees

- If employer determines that an employee did not work full-time during standard measurement period, then employer permitted to treat employee NOT as FTE during stability period.
- For these non-FTEs, the stability period cannot be longer than the standard measurement period.

# Ongoing Employees

- Stability period
  - Applies to those employees determined to be FTE during standard measurement period.
  - Must be at least 6 consecutive calendar months
  - Cannot be shorter that standard measurement period
  - Begins after standard measurement period (and any associated administrative period)

# Ongoing Employees

- Employer has option to use “administrative period”
  - Because employers may need time between the standard measurement period and the stability period to determine which ongoing employees are eligible for coverage and to notify and enroll those employees, an employer may make time – i.e., “administrative period” – for these administrative steps\
  - Administrative period can be up to 90 days
  - Administrative period cannot reduce or lengthen the standard measurement period or the stability period
  - Cannot create gaps in coverage – It will overlap with prior stability period so that during the administrative period following the standard measurement period, ongoing FTEs (because they have been previously determined to be FTE based on prior standard measurement period) will continue to be offered coverage.

LANIER FORD

# Seasonal and Variable Hour Employees

- For seasonal and variable hour employees, employer permitted to use “initial measurement period” to determine whether employee is FTE
- Initial measurement period can be between 3 and 12 months
- Still have option of administrative period
- However, initial measurement period plus administrative period cannot extend past the last day of the first calendar month beginning on or after the 1-year anniversary of the employee’s start date – that is, a total of 13 months and a fraction of a month (if start date mid-month)

LANIER FORD

# Seasonal and Variable Hour Employees

- The employer measures the hours of service completed by the employee during the initial measurement period and determines whether the employee is FTE (i.e., an average of 30 hours or more per week).
- If employee is FTE:
  - Stability period same as standard measurement period.
  - Stability period must be at least 6 consecutive calendar months and not shorter than initial measurement period.
  - Stability period begins after the initial measurement period and any associated administrative period.

LANIER FORD

# Seasonal and Variable Hour Employees

- If employee is not FTE:
  - Employer treats employee as not FTE during stability period.
  - Stability period must not be more than one month longer than the initial measurement period.
  - Stability period must not exceed the remainder of the standard measurement period and any associated administrative period in which the initial measurement period ends.

# New Employees – FTEs

- If a new employee is reasonably expected at his or her start date to work full-time, then must offer coverage.
- But 90-day waiting period applies -- Employer can wait 3 calendar months after start date before offering coverage; employer will not be subject to penalty

# New Employees – Transition Rules

- After employed for initial measurement period AND standard measurement period, tested for FTE status beginning with that standard measurement period; same as ongoing employees.
- If determined to be FTE during either initial measurement period OR standard measurement period, must be treated as FTE for entire associated stability period.
  - Even if employee is determined to be FTE during initial measurement period BUT NOT FTE during standard measurement period.
  - Employer may treat employee as NOT FTE only after end of stability period; thereafter, employee's status determined same as ongoing employees

LANIER FORD

# Questions?

J. Clark Pendergrass, J.D.

**Lanier Ford Shaver & Payne P.C.**

2101 W. Clinton Ave., Ste. 102
Huntsville, AL 35805
256-535-1100
JCP@LanierFord.com

**www.LanierFord.com**

LANIER FORD