



# 2016 Mid-Year Compliance Potpourri



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*Marshall  
& Sterling*  
GROUP BENEFITS

# Today's Agenda



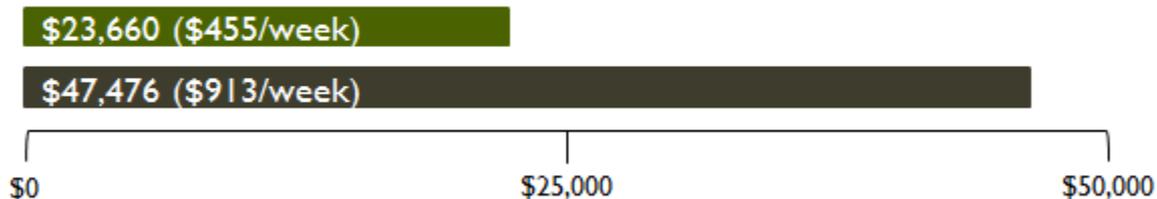
- New FLSA Overtime Rules
- DOL Penalty and Fee Increases
- Common ACA Pitfalls
- Making Corrections to 1094 & 1095 Forms
- Marketplace Subsidy Notices
- HHS vs. IRS ACA Appeals Process
- Other ACA Updates:
  - Nondiscrimination rules under §12557
  - Opt out payments and affordability
  - PCORI Reminder

# FLSA Overtime Rules

**Final Rule was distributed on May 18, 2016. The effective date is December 1, 2016.**

- Updates the “white collar” exemption salary threshold to \$47,476 from \$23,660 annually
  - Employers may satisfy the minimum salary requirement by including up to 10% of bonuses and incentives
- Revises the annual compensation requirements for Highly Compensated Employee (HCE) testing from \$100,00 to \$134,004
- Provides for automatic (cost of living) adjustments to these levels every three years

## EXEMPTION THRESHOLDS BY YEAR



# DOL Penalty & Fee Increases

- Federal Civil Monetary Penalties Inflation Adjustment Act Improvements Act of 2015:
  - Directs agencies to adjust their penalties for inflation each year
  - Requires agencies to publish “catch up” rules this summer to make up for lost time since the last adjustments
- DOL issued it’s final rule on July 1, 2016, substantially increasing various penalties for violations of ERISA
  - Catch-up adjustments apply to penalties assessed after 8/1/2016 for violations that occurred after 11/2/2015

Violation	Current Penalty	New Penalty
<b>ERISA § 502(c)(2)</b> Daily penalty for failure to file required annual reports, including Form 5500	\$1,100	\$2,063
<b>ERISA § 209(b)</b> Per participant penalty for failure to furnish certain reports to participants or failure to maintain records	\$11	\$28
<b>ERISA § 502(c)(9)(a)</b> Daily penalty for failure by employer to inform employees of Medicaid/CHIP coverage opportunities.	\$100 per day/employee	\$110 per day/employee
<b>ERISA § 715</b> Per participant penalty for failure of group health plans to provide Summary of Benefits Coverage	\$1,000	\$1,087

The complete list of all the penalties increased by the regulations can be found here:

<https://www.dol.gov/sites/default/files/2016-inflation-penalty-chart.pdf>

# Common ACA Pitfalls

- I. Inaccurately Counting Seasonal Workers
- II. Paying for Individual Premiums
- III. Assuming All Employers Are Required to Offer Health Insurance
- IV. Not Considering Common Ownership
- V. Assuming Employers Must Offer the Same Coverage to All Employees
- VI. Thinking Only Large Employers Need to Comply With ACA Information Reporting Requirements

# I. Counting Seasonal Workers for Pay or Play

## Seasonal Worker Exception

- If an employer's workforce exceeds 50 full-time employees (including full-time equivalent employees) for **120 days or less** (or 4 calendar months) during the preceding calendar year, and the employees in excess of 50 who were employed during that period were seasonal workers, the employer is not considered an ALE for the current calendar year.
- A **seasonal worker** for this purpose is an employee who performs labor or services on a seasonal basis (e.g., retail workers employed exclusively during holiday seasons).

## Seasonal Worker vs. Seasonal Employee

- Only the term '**seasonal worker**' is relevant for determining whether an employer is considered an ALE.



- A **seasonal employee** is one who is reasonably expected to work less than six months annually, at around the same time each year. Typically not considered "full-time" and can be tracked for eligibility.

## II. Paying for Individual Premiums

Arrangements where an employer directly pays part or all of the premium for an employee's individual health insurance policy are **employer payment plans**.

Employer payment plans are generally considered group health plans that do not comply ACA. Such arrangements may be subject to a **\$100 per day** excise tax per applicable employee (\$36,500 per year, per employee) under the IRC.

- ✓ Increasing an employee's taxable compensation “no strings attached” is still an option.
- ✓ While employers cannot pay for employees' **individual** health insurance premiums, they may cover premium costs for employer provided group health plans.

## III. Assuming All Employers Must Offer Health Insurance

- The law does not penalize small employers that do not offer coverage to their employees.
- Only applicable large employers (ALEs)—generally those with at least 50 full-time employees, including full-time equivalent employees (FTEs), in the preceding calendar year—may be liable for a “pay or play” penalty if they do not offer **affordable & minimum value** health insurance to full-time employees and their dependents.

## IV. Not Considering Common Ownership

- Companies that have a common owner or are otherwise related generally are combined and treated as a single employer for purposes of determining ALE status.
- If the combined total of commonly owned companies meets the threshold (50 full-time + FTE employees) then each separate company (called an ALE member) is considered an ALE.

## V. Thinking the Same Coverage Must be Offered to All Employees

- Under current law, distinctions among groups of similarly situated employees may be permitted if they are based on bona fide employment-based classifications consistent with the employer's usual business practice:
  - **Example:** full-time vs. part-time; hourly vs. salary
  - *Classifications cannot be based on health factors or protected classes such as age, sex, disability, or genetic information.*
- The ACA requirement that fully insured group plans comply with rules “similar” to the rules prohibiting discrimination in favor of highly compensated individuals (currently applicable to self-insured plans) is **delayed pending further regulation**.
- **Note:** Health benefits offered as part of a cafeteria plan generally will be subject to the nondiscrimination requirements of Internal Revenue Code section 125.

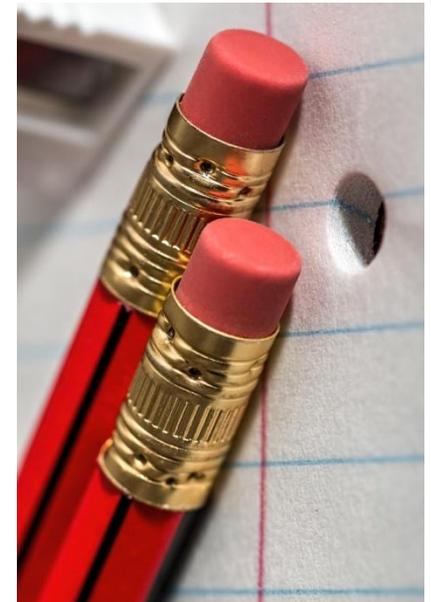
# VI. Thinking Only Large Employers Need to Comply with ACA Information Reporting Requirements

There are two types of reporting entities subject to the ACA information reporting requirements.

	Section 6055	Section 6056
Applies to:	Providers of minimum essential coverage (MEC): Self-insured plan sponsors; insurers	Applicable Large Employers (ALEs)
Requires reporting parties to:	<ul style="list-style-type: none"> <li>File information with the IRS</li> <li>Provide statements to covered individuals</li> </ul>	<ul style="list-style-type: none"> <li>File information with the IRS</li> <li>Provide statements to full-time employees</li> </ul>
Purpose is to assist:	<ul style="list-style-type: none"> <li>IRS administer the individual mandate</li> <li>Individuals show compliance with the individual mandate</li> </ul>	<ul style="list-style-type: none"> <li>IRS administer the employer shared responsibility rules and determine eligibility for subsidies</li> </ul>

# Making 1094/1095 Corrections

- E-filings accepted through the IRS ACA Information Returns (AIR) system will receive one of the following submission status designations:
  - Rejected
  - Accepted
  - Partially Accepted
  - Accepted with errors
- If a submission is **rejected**, employer will have 60 days from the date of rejection to submit a replacement.
- For submissions that are **accepted with errors**, employers may continue to submit corrections after the June 30, 2016 filing deadline.
- The penalty for providing/filing erroneous statements is \$250 per return:
  - \* Correcting a reporting failure within 30 days of due date reduces penalty to \$50 per return
  - \* Reporting failures corrected after 30 days but on or before August 1 of the filing year, the penalty is \$100 per return.



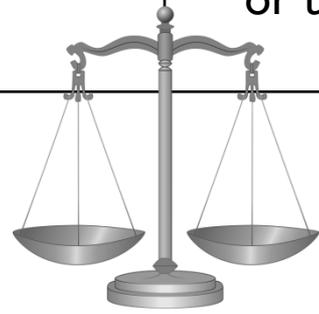
**Reminder:**  
Transitional relief applies for 2015 reporting errors if good faith effort was made.

# Marketplace Notices of Employee Subsidy

- In 2016, federally-facilitated Marketplaces will send notices to employers whose employees received premium credits in 2016 and whose employees provided the Marketplace with their employer's address
- State Marketplaces generally have been doing this in 2015 (e.g. CT)
- Employers may appeal (within 90 days) and assert that affordable, minimum value coverage was offered or that the employee enrolled in coverage, and therefore the employee is ineligible for a premium credit
- If successful, the FFM notifies the employee to update his or her Marketplace application to reflect the access to or enrollment in other coverage, and that failure to do so may result in a tax liability
- *Pay-or-Play penalties are determined by the IRS without regard to whether the Marketplace issued a notice or the employer engaged in any appeals process*

# HHS vs. IRS ACA Appeals Process

<b>HHS</b> <i>Employer Notification</i>	<b>IRS</b> <i>Enforcing Employer Mandate</i>
<ul style="list-style-type: none"><li>▪ Individual receives an APTC → triggers notice</li><li>▪ Employer has 90 days from the date of the Notice to appeal</li><li>▪ States with their own appeal form: CA, CO, DC, KY, MD, MS, NY, VT</li></ul>	<ul style="list-style-type: none"><li>▪ Publication 556 outlines the appeal process</li><li>▪ Employer Mandate penalty will not be assessed until July 2016 at the earliest</li><li>▪ May appeal directly to the IRS or to US Tax or District Court</li></ul>



# Assessment and Collection of ESR Payments



Employers will not report or include an employer shared responsibility payment with any tax return they may file. Instead, based on information from the employer and from employees' tax returns, the IRS will calculate the potential employer shared responsibility payment and contact the employer to inform it of any potential liability.

- The employer will then have an opportunity to respond before any assessment or notice and demand for payment is made.
  
- An employer will not be contacted by the IRS regarding an employer shared responsibility payment until after their employees' individual income tax returns are due for that year – which would show any claims for the premium tax credit.
  
- If, after the employer has had an opportunity to respond to the initial IRS contact, the IRS determines that an employer is liable for a payment, the IRS will send a notice and demand for payment to the employer. That notice will instruct the employer how to make the payment.

# HHS Final Rule on Nondiscrimination Under § 1557

- In May, the Department of Health and Human Services (HHS) published a final rule implementing §1557 of the ACA, which prohibits discrimination on the basis of, among other grounds, sex (including gender identity) in certain health programs and activities.
- Entities covered under the rule cannot deny, cancel, limit or refuse to issue health coverage; deny or limit a claim; or impose additional cost sharing on a protected individual.
- The rule will require many group health plans and employers to cover health care services provided to transgender individuals



# Opt-Out Arrangements and Affordability

Under the newly proposed IRS rule, the amount of any cash payment made available to an employee under an opt-out arrangement increases the employee's required contribution for purposes of determining the affordability of the eligible employer-sponsored plan to which the opt-out arrangement relates.

**Exception:** “Eligible opt-out arrangement.” An eligible opt-out arrangement is an arrangement under which the employee's right to receive an opt-out payment is conditioned on:

1. The employee declining to enroll in employer-sponsored coverage; and
  2. The employee providing reasonable evidence that he or she has or will have minimum essential coverage (*other than coverage in the individual market, whether or not obtained through the Marketplace*) during the period of coverage to which the opt-out arrangement applies.
- Until a final rule is issued and becomes applicable, employers are not required to increase the amount of an employee's required contribution by amounts made available under an opt-out arrangement for affordability purposes (*unless opt-out arrangement was adopted after 12/16/2015*)

# Reminder: PCORI Fees Due

- Employers with self-insured medical plans, including most HRAs, are required report & pay the fee annually using IRS Form 720
- Payment is due on July 31<sup>st</sup> of the year following the last day of the policy year or plan year
- ★ **2015 Fees are due on Monday, August 1, 2016**

Plan Ending Date Month	File Return By	Applicable Rate
Jan - 2015	July 31, 2016	\$2.08
Feb - 2015	July 31, 2016	\$2.08
Mar - 2015	July 31, 2016	\$2.08
Apr - 2015	July 31, 2016	\$2.08
May - 2015	July 31, 2016	\$2.08
Jun - 2015	July 31, 2016	\$2.08
Jul - 2015	July 31, 2016	\$2.08
Aug 2015	July 31, 2016	\$2.08
Sep - 2015	July 31, 2016	\$2.08
Oct - 2015	July 31, 2016	\$2.17
Nov - 2015	July 31, 2016	\$2.17
Dec - 2015	July 31, 2016	\$2.17

# Questions!

