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Health Care Reform under the ACA:

Employer Shared Responsibility

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Employer Shared Responsibility

Health Care Reform Under the ACA

Under new Code Section 4980H, the Affordable Care Act's the "Employer Mandate," applicable large employers are now required to:

1. Manage employee information and track employees' hours of service for benefit eligibility & affordability compliance, as well as to maintain the data required for audit/reporting purposes.
2. Offer ALL (95%) full-time employees minimum essential health insurance coverage OR pay a **$2,000*** per employee penalty for ALL full-time employees if at least one full-time employee receives a marketplace subsidy (minus the first 30).
3. Offer coverage that provides minimum value: Plans must cover 60% of costs (such as deductible, co-insurance, co-payments) OR pay a penalty: **$3,000*** per each full-time employee using tax credit to fund exchange purchase.
4. Offer coverage that is affordable: The single premium for lowest cost plan must be no more than 9.5%* of your lowest paid employee's household income OR pay a penalty: **$3,000*** per each full-time employee using tax credit to fund exchange purchase.
5. Comply with new IRS information reporting requirements used to administer the employer shared responsibility provisions of section 4980H OR pay a penalty: $250 per return up to **$3 million**, or $500 per return for intentional disregard.

**Amounts are adjusted with inflation each year.*

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ALE (Applicable Large Employer) Determination

Calculating your number of FTEs

Under the ACA a "large employer" subject to the play-or-pay mandate is one whom employed an average of at least 50 full-time equivalent employees (FTEs) on business days during the preceding calendar year.

To determine whether it constitutes an "applicable large employer" in the current year, an employer must calculate the actual hours worked by all (both full- and part-time) employees during the previous year.

Calculating the number of FTEs:

Done on a monthly basis to determine annual average

a. **Actual full-time employees** (those who worked over 120 hours during the month)
   +
b. **Any "full-time equivalents"** (combining the monthly hours of all employees who work part-time and dividing that number by 120).

Example: A firm has 35 full-time employees (working over 120 hours per month) and 20 part-time employees who each work 96 hours per month. These part-time employees' hours would be treated as equivalent to 16 full-time employees for the month, based on the following calculation:

20 employees x 96 hours / 120 = 1920 / 120 = 16 FTEs

Here, the firm would be considered a "large employer," based on a total FTE count of 51 (35 full-time employees + 16 FTEs based on the number of part-time hours worked)

Special Rules:

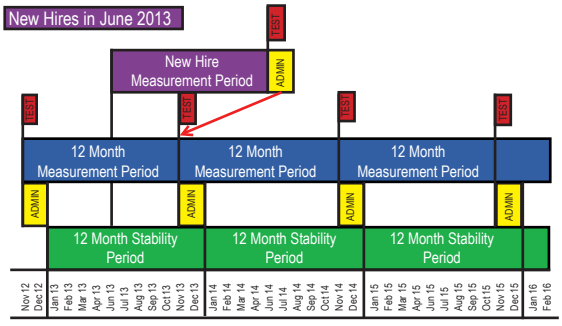
- **Seasonal Employees:** Full-time seasonal employees who work under 120 days during the year are excluded from FTE calculation. Meaning, if an employer's workforce exceeds 50 full-time equivalent employees for 120 days or fewer during a calendar year and the employees in excess of 50 who were employed during that period of no more than 120 days were seasonal workers, the employer is not an "applicable large employer."
- **Controlled Groups & Aggregation Issues:** The Internal Revenue Code (IRC) Section 414 treats two or more employers as a single employer if there is sufficient common ownership or a combination of joint ownership and common activity. All entities treated as a controlled group under IRC § 414 (e.g. parent-subsidiary, brother-sister) will be treated as a single employer for purpose of ALE determination. Meaning, the full-time equivalent employees of all members of the controlled group are aggregated to determine whether the group constitutes a single "applicable large employer." When the combined total of FTEs meets the threshold, each separate company or ALE member is subject to the employer shared responsibility provisions even if a particular company or companies individually do not employ enough employees to meet the 50-full-time-employee threshold.

Tracking Employees for Full-Time/Eligibility Purposes

Generally, under Employer Shared Responsibility provisions, no penalty can be imposed on a large employer who offers group health plan coverage to at least 95% of its full-time employees and dependents, if that coverage is affordable and provides minimum value. Full-time is defined as working on average at least 30 hours per week or 130 hours per month.

Employers may identify ACA Full-time employees using:

1. **The "month-to-month" method:** Employer identifies full-time employees on a monthly basis.
2. **The "look-back" measurement period:** Employer tracks employee eligibility on a periodic basis, looking back at a defined **"standard measurement period"** (3-12 months) to determine full-time status for subsequent "stability period" (the greater of 6 months or the length of the standard measurement period).
   - Employers may use "administrative periods" of up to 90 days between the measurement period and the stability period to make ACA full-time employee determinations and perform other administrative functions (e.g. providing enrollment material)
3. **Measuring <u>new</u> variable hour & seasonal employees:**
   - A variable hour employee is one who, based on the facts and circumstances at the start date, is not reasonably expected to work on average at least 30 hours per week; Employers can delay coverage for new variable hour employees during their measurement period.
   - Start tracking hours the first day of month following date of hire; **NOTE: the total combined length of an initial measurement period plus the subsequent administrative period may not exceed 13 months**, plus any portion of a month remaining until the first day of the following month. New hires will merge into the "Standard Measurement Period" during their "Initial Stability Period" (see below):



Special Rules:

- For both variable hour & seasonal employees count: Actual hours + Hours of paid time off; Credit hours of federally-mandated leave (e.g. FMLA) using average hours method
- Special rules for schools: Give credit for periods of unpaid school closing (e.g. summer break) up to 501 hours; Include class prep time for professors (2 ¼ hours counted for each classroom hour)
- 13 week break in employment: Disregard prior hours & treat as new hire (*26 weeks for professors; *Rule of parity)
- Classifications of Non-Hourly Workers: Employers may employ different methods of determining full-time status for different classes of non-hourly workers as long as the separate classification of employees is reasonable and applied consistently

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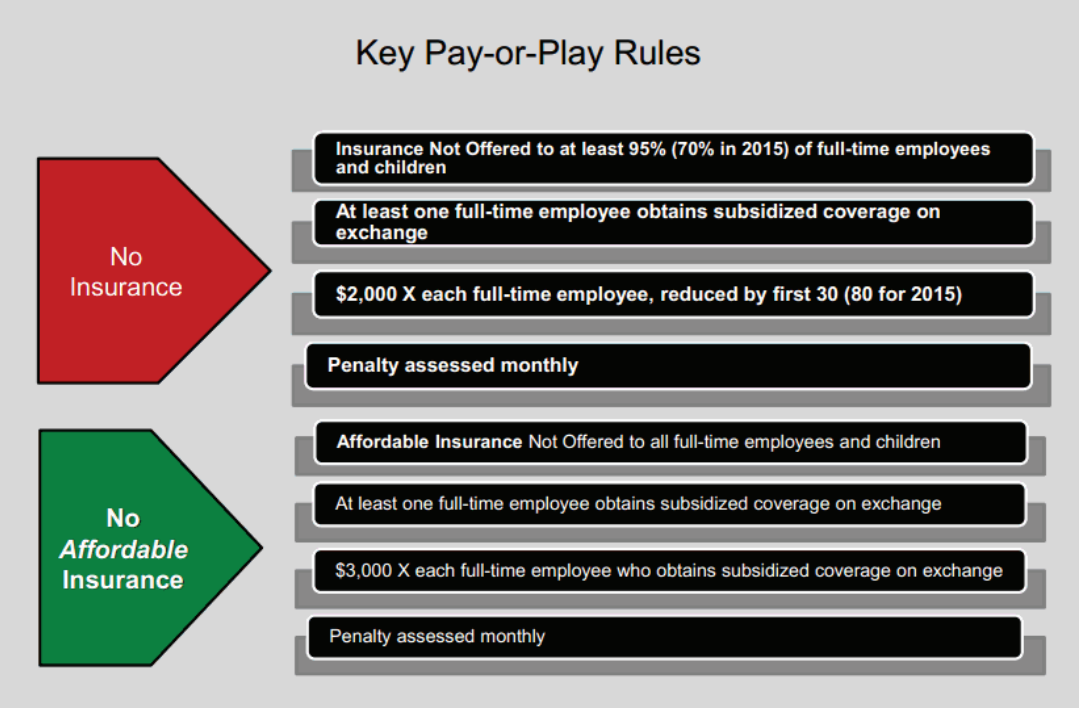
Pay or Play Penalties

2 major types of penalties can be triggered for failure to comply with the ACA:

1. **Pay Penalty:** (or no offer penalty/"Sledgehammer" penalty)
   - Triggered when an employer fails to offer "substantially all" full-time employees (and their dependents) minimum essential health insurance coverage
   - "Substantially all"=95% of full-time employees
   - $2,000 (+inflation) per year for each full-time employee if at least one full-time employee obtains federally subsidized coverage, with the first 30 employees excluded from calculation
2. **Play Penalty:** (or defective coverage penalty/"Icepick" penalty)
   - Triggered when an employer offers coverage, but that coverage is defective in some way
   - Defect can be related to minimum value (MV), affordability, or both
   - When affordable MV coverage is not offered, there is a $3,000 (+inflation) penalty for each full-time employee who actually receives a premium tax credit via the Health Insurance Marketplace.

Note: When an Employer offers an employee coverage that is affordable and provides minimum value, the employee is NOT eligible for a premium subsidy through the Exchange.



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ACA Minimum Value and Affordability

- **Minimum Value (MV):** What cost sharing (deductible, co-insurance, co-payments) are included?—Plans which pay 60% of costs=MV (Bronze level plans or higher, usually not a problem)
- **Affordability:** What premiums are employees are required to pay? Look at the single premium for lowest cost plan—is it no more than **9.69%** (for 2017) of your lowest paid employee's household income? **(Biggest challenge for employer)**

IRS Affordability Safe Harbors:

1. *W-2 income*
2. *Rate of Pay (Monthly)*
3. *Federal Poverty Line*

1. W-2 Safe Harbor

Allows employers to use each employee's W-2 income (Box 1) from the current year to determine affordability

Calculation: When using this method, the W-2 Form for the current year is used. That is, the total W-2 compensation for 2017 (from a particular employer) determines the maximum monthly amount that employer can charge the employee for self-only coverage, meaning the employer probably must set the maximum monthly contribution based on the monthly W-2 amount. The final regulations provide that the employee's required contribution during the year must remain a consistent dollar amount or a consistent percentage of all Form W-2 wages during the year; an employer is not permitted to make discretionary adjustments for a pay period.

To calculate affordability for full time employees not employed the full year, multiply the W-2 wages for the calendar year by a fraction equal to the months for which coverage was offered to the employee over the months the employee was employed; **Example:** an employee worked nine months of a calendar year, and was offered coverage during six of those months. At the end of the year, the employee received a Form W-2 reflecting wages of $30,000. To calculate, multiply $30,000 by 6/9 to get adjusted W-2 wages of approx. $20,000. Then calculate 9.69% of same.

Disadvantages:

- Box 1 income does not include pre-tax contributions for 401(k) or cafeteria plans, so if an employee makes these pre-tax contributions this will reduce the maximum affordable amount.
- This is calculated on an employee-by-employee basis, and will have to be calculated each month if W-2 income varies. This can be administratively burdensome and time consuming.
- An employer might not want to use the W-2 method if it has variable hour or seasonal employees, or if it has employees whose hours of service or compensation vary over the course of the year.

Advantages:

- The W-2 income safe harbor generally will result in a higher monthly premium "affordable" amount.
- This is because the W-2 method includes all hours the employee actually worked and hours for which no work was performed but the employee was paid or entitled to payment (e.g., paid holidays and vacation, paid leave and disability). It is not limited to 130 hours/month, as is the Rate of Pay safe harbor below.
- An employer might want to use the W-2 method if it has a stable workforce comprised mostly of regular full-time employees who work 40 hours per week and whose compensation is unlikely to decrease during the year.

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2. Rate of Pay (Monthly) Safe Harbor

Design-based method allows employers to calculate affordability on a monthly basis

Calculation:

- For hourly employees: 130 hours multiplied by the employee's hourly rate as of the first day of the plan year or the lowest hourly rate of pay during the calendar month.
- For non-hourly employees: use the employee's monthly salary (yearly salary/12) as of the first day of the plan year (regardless of hours on which is based).

An employer can use the "rate-of-pay" safe harbor even if the employer reduces an employee's hourly pay rate during the plan year, but the rate-of-pay safe harbor will apply separately for each month. This will result in a lower maximum "affordable" rate for those months an employee's hourly rate has been reduced. Note that if an employer uses the rate of pay of the lowest-paid employee and multiplies this by 9.69%, the resulting monthly amount will meet the test for all employees.

Disadvantages:

- The employer can only multiply the hourly amount by 130 hours per month, even if employees actually work more hours.

Advantages:

- Although technically this is calculated on an employee-by-employee basis, it can also be a "fail-safe" design-based safe harbor because if this Affordability test is met for the lowest-paid employee, then it will also be met for all other employees.
- This affordability calculation will apply even if an employee works fewer hours or is on leave during some months (e.g. if a full-time hourly employee earns $12 per hour in a calendar month, coverage is affordable if the employee cost for employee-only coverage is not more than 9.69% of $12 x 130 hours, or $151.16, even if the employee has a significant amount of unpaid leave or otherwise reduced hours in one or more calendar months.
- The employer can calculate the maximum amount for affordability as of the beginning of the plan year (and on a monthly basis if hourly rate is reduced during the year), and need not wait until after the end of the year to determine it.

Rate of Pay Table:

Hourly Wage	Monthly Income (Hourly Rate x 130)	9.69% of Monthly Income
$8.00	$1,040	$1,040
$10.00	$1,300	$1,300
$12.00	$1,560	$1,560
$15.00	$1,950	$1,950

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3. Federal Poverty Line Safe Harbor

Allows employers to use 100% of the Federal Poverty Line income (for a household size of one) to determine affordability

Calculation: There is no calculation other than taking the FPL figure, dividing it by 12, and calculating 9.69% of that figure.

For 2017 9.69% of $11,880.00 (the FPL for one person) is $95.93/month. The final regulations allow an employer to use the FPL rate in effect six months prior to the start of the plan year, rather than at the start of the plan year. Employers generally set rates three to six months before the start of the plan year.

Disadvantages:

- The Maximum Amount: This method typically provides the lowest threshold allowed for the monthly premium. For example, in 2017 100% of FPL for one person is $11,880.00, so the maximum employee contribution (for self-only coverage) per month would be only $95.93.
- Other methods generally allow a higher monthly premium charge.

Advantages:

- This is not a separate calculation for each employee. It is a "fail-safe" safe harbor that will apply even if the amount is less than a particular employee's actual income for the month or year.
- An employer who uses this safe harbor will always meet the affordability standard each month.
- This safe harbor may be most useful for employers who use the look-back measurement period to determine if variable hour or seasonal employees have full-time status (if an employer's lowest paid employee is a "moving target" may have to check affordability each month throughout year unless they use this "100% of FPL" method).
- May be useful to employers with employees whose hours of service are higher earlier in the year and are reduced later in the year.

New 6055/56 Requirements

The Affordable Care Act added section 6055 & 6056 to the Internal Revenue Code, which requires submission of information returns the IRS will use to administer the employer shared responsibility provisions of section 4980H, and to show compliance with the individual shared responsibility provision in section 5000A.

- **Deadline to file the reports:**
  - Returns due to full-time employees by January 31st
  - Returns due to the IRS by February 28 if filing on paper; and March 31 if filing electronically
- **Employers with insured health plans:**
  - **Section 6056** of the IRC requires applicable large employers (ALEs) to file information returns with the IRS and provide statements to their full-time employees about the health insurance coverage the employer offered.
  - Each ALE member may satisfy the requirement to file a section 6056 return by filing a Form 1094-C (transmittal) and, for each full-time employee, a Form 1095-C (employee statement), or other forms the IRS may designate.
- **Employers with self-insured health plans:**
  - **Section 6055** to the Internal Revenue Code provides that every provider of minimum essential coverage will report coverage information by filing an information return with the IRS and furnishing a statement to individuals.
  - An ALE member that maintains a self-insured plan also uses a Form 1095-C to satisfy the reporting requirements under section 6055. The Form 1095-C will have separate sections to allow ALE members that sponsor self-insured group health plans to combine reporting to satisfy both the section 6055 reporting requirements and the section 6056 reporting requirements, as applicable, on a single return.

The following tables describe:

i) the type of information required under sections 6055 & 6056; and
ii) the specific information required on forms 1094-c & 1095-c

i.)

Type of Reporting	Affected Employers	Required Information
Code 6056 - Large employer health coverage reporting	Large employers (at least 50 full-time employees, including full-time equivalents	Terms and conditions of health plan coverage offered to full-time employees (helps the IRS administer the ACA's shared responsibility penalty for large employers)
Code 6055 - Reporting of health coverage by health insurance issuers and sponsors of self-insured plans	Employers with self-insured health plans	Information in each individual provided with coverage (helps the IRS administer the ACA's individual mandate

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ii.)

1094-c (employer cover sheet)	1094-c (employer cover sheet)
Transmittal form insurers and self-funded plans will file with IRS along with all the Forms 1095-C. ▪ The name and contact information of the employer ▪ The total number of Form 1095-C to be filed (line 18) ▪ Monthly ALE Member Information: a) Minimum Essential Coverage Offer indicator; b) Full-Time Employee Count for ALE Member; c) Total Employee Count for ALE Member; d) Aggregated Group Indicator; e) Code Section 4980H Transition Relief Indicator	Coverage information form required for each full-time employee. ▪ Identify the type of health coverage offered to a full-time employee for each calendar month, including whether that coverage offered minimum value and was affordable for that employee. Employers must use a code to identify the type of health coverage offered and applicable transition relief. ▪ Employers that offer self-insured health plans also must report information about each individual enrolled in the self-insured health plan, including any full-time employee, non-full-time employee, employee family members, and others.

Penalties & Available Defenses:

Penalties for inaccurate filings or failure to file:

- **$250 per return, with a maximum of $3 million under Code sections 6721 and 6722.**
- **Penalties apply separately to Code sections 6055 and 6056 reporting:**
  - **Section 6721 (filing with the IRS) penalty:** may apply to a provider that fails to file timely information returns, fails to include all the required information, or includes incorrect information on the return
  - **Section 6722 (reporting to the employee) penalty:** may apply to a provider that fails to furnish timely the statement, fails to include all the required information, or includes incorrect information on the statement.

Penalty Relief Provisions:

- Under Code section 6724, the IRS will not impose penalties under sections 6721 and 6722 on reporting entities that can show that they have made **good faith efforts** to comply with the reporting requirements. Specifically, relief is provided from penalties for returns and statements filed in 2016 to report 2015 coverage, but only for incorrect or incomplete reported information.
- No relief is provided in the case of reporting entities that cannot show a good faith effort to comply with the information reporting requirements or that fail to timely file an information return or furnish a statement.

The Cadillac Tax

The Cadillac Tax is a significant revenue provision of ACA. Scheduled to take effect in **2020**, the annual 40% excise tax on high-cost health plans is aimed at reducing health care usage and costs by encouraging employers to offer cost-effective plans and engage employees in sharing in the cost of care. This fact sheet is based on Marshall & Sterling's current understanding of the Cadillac Tax. Final regulations have not been issued, and we expect further guidance before the tax is assessed.

What It Is

Permanent annual tax beginning in 2020 on employers that provide high-cost benefits through an employer-sponsored group health plan.

Purpose

To generate $80 billion over the next 10 years to help finance the expansion of health coverage.

Amount

The tax is 40% of the cost of plans that exceed predetermined threshold amounts.

- Cost includes the total premiums paid by both employers and employees, but not cost-sharing amounts such as deductibles and copays when care is received.
- For planning purposes, the thresholds for high-cost plans are $10,200 for individual coverage, and $27,500 for family coverage (these thresholds will be updated for 2020 when final regulations are issued and indexed for inflation in future years).
- The thresholds will also be adjusted for:
- - High-risk professions such as law enforcement and construction.
- - Group demographics including age and gender.
- - For pre-65 retirees and individuals in high-risk professions, the threshold amounts are $11,850 for individual coverage and $30,950 for family coverage.

Who Pays

- **Insured:** Employers calculate and insurers pay (could come back as increased premiums)
- **Self-funded:** Employers calculate and pay (includes HSA/HRA/MSA & other employer contributions)

Determination of Plan Cost

The tax is based on the total cost of each employee's coverage above the threshold amount. The cost includes premiums paid by employers and employees plus:

- Employer and employee contributions to Health Care Flexible Spending Accounts, Health Reimbursement Accounts and Health Savings Accounts.
- Costs of Employee Assistance Plans with counseling benefits, onsite medical clinics & wellness

How it works: Examples based on current thresholds

Self-only coverage

A $12,000 individual plan would pay an excise tax of $720 per covered employee:

$12,000 - $10,200 = $1,800 above the $10,200 threshold

$1,800 x 40% = $720

Family coverage

A $32,000 family plan would pay an excise tax of $1,800 per covered employee:

$32,000 - $27,500 = $4,500 above the $27,500 threshold

$4,500 x 40% = $1,800

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ACA Requirements Timeline

The below timeline covers major events affecting group health plans

2012

- **W-2 Reporting on Cost of Employer Sponsored Health Coverage:** 2012 taxable year for 250 or more W-2s in 2011, sent no later than January 31, 2013
- **Preventive Health Services for Women with No Cost-sharing Requirements:** Plan years beginning on or after August 1, 2012
- **Summary of Benefits and Coverage (SBC):** Annual enrollments beginning on or after September 23, 2012
- **Patient-Centered Outcomes Research Institute (PCORI) Fee:** Policy or plan years ending on or after September 30, 2012

2013

- **HIPAA Electronic Transactions and Operating Rules:** Staggered from January 2013 to January 2016
- **Medicare Tax Increase (0.9% for wages over $200,000):** Taxable years starting on or after January 1, 2013
- **Health FSA $2,500 Limit on Salary Reduction Contributions (indexed for inflation):** Plan years on or after January 1, 2013
- **Medical Expense Tax Deduction Increase (from 7.5% to 10% of AGI):** Taxable years starting on or after January 1, 2013 (exception if individual or spouse is at least 65 for taxable years of 2013–2016)
- **Elimination of Tax Deduction for Retiree Prescription Drug Expenses:** Tax years beginning January 1, 2013
- **Employer-provided Marketplace (Exchange) Notice FLSA:** October 1, 2013

2014

- **Annual Dollar Limits (previously restricted, now prohibited on essential health benefits):** Plan years starting on or after January 1, 2014
- **Waiting Period Limitation (no more than 90 days):** Plan years starting on or after January 1, 2014
- **Pre-existing Condition Exclusions Prohibited:** Plan years starting on or after January 1, 2014
- **Employer Wellness Incentives (may increase from 20% of the cost of coverage to 30%):** Plan years beginning on or after January 1, 2014
- **Clinical Trial Coverage:** Plan years starting on or after January 1, 2014
- **Health Insurance Exchanges:** Open January 1, 2014
- **Individual Mandate (most individual taxpayers must have minimum essential coverage or be subject to a penalty):** January 1, 2014
- **Transition Risk Reinsurance Fee:** January 1, 2014
- **Annual Health Insurer Fee:** September 30, 2014

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ACA Requirements Timeline

Continued...

2015

- **"Play or Pay" Employer Mandate Coverage Requirements (employers with 100 or more FTEs):** Plan years starting on or after January 1, 2014
- **Employer Annual Reporting of Employee Coverage (employers with 50 or more FTEs):** Reporting on 2015 taxable year, reports due in early 2016

2016

- **"Play or Pay" Employer Mandate Coverage Requirements (employers with 50 or more FTEs):** Plan years starting on or after January 1, 2015

2020

- **40% tax on high-cost health coverage ("Cadillac Tax"):** January 1, 2020

Pending: *The following Health Care Reform provisions have been delayed until further guidance is issued*

- ~~**Automatic Enrollment (for employers with more than 200 full-time employees) REPEALED!**~~
- **Nondiscrimination Rules for Fully-Insured Plans**

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Marshall & Sterling's ACA Management Dashboard

The Affordable Care Act (ACA) challenges employers to meet new requirements and make new business choices. Under the ACA, employers must manage medical benefits, eligibility, affordability, and compliance in unfamiliar ways.

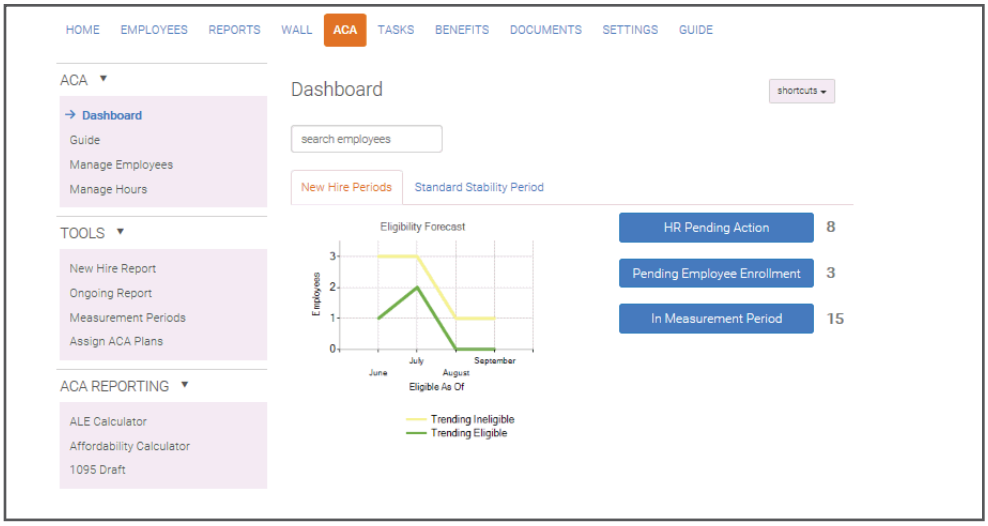
New ACA requirements coupled with the need for critical, accurate and timely data, place pressure on existing employer resources, that automated systems designed to facilitate compliance can alleviate.

The Marshall & Sterling ACA Management Dashboard provides a simple solution that enables employers to meet ACA requirements while optimizing their medical benefits.

How it Works:

- Using real-time payroll data, the ACA Dashboard provides employers with the actionable information they need to address the evolving complexity of the ACA
- Provides a single-point-in-time snapshot of employee demographics and benefits eligibility, which allows employers to outline and document their strategy for ACA compliance
- Track eligibility and affordability issues associated with multiple measurement, wait and stability periods across complex employee demographics on an ongoing basis
- Ensures regulations are met and penalties are avoided with constant affordability and eligibility compliance notifications
- Utilizes tracked employee data to export Microsoft Excel reports and to generate annual IRS information returns with accurate, necessary ACA documentation to demonstrate compliance

In addition to our ACA Compliance Dashboard, Marshall & Sterling provides in-house legal consulting on the complex data, analysis, compliance, reporting, and auditing requirements that challenge employers under the ACA.



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