Health Care Reform
Legal Update

HealthFlex Mini-Summit
March 11, 2015
Disclaimer

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Agenda

- ACA* Litigation
- ACA 2015 Outlook
- Reporting Requirements
- Cadillac Plan Tax
- Account-Based Plans

* ACA: Affordable Care Act (Patient Protection and Affordable Care Act, PPACA)
ACA Litigation
Premium Tax Credits

• Exchange plan premiums subsidized with federal assistance:
  – **Premium tax credit (PTC)**
  – Individuals and families with **household income**
    **between 100-400% of federal poverty level (FPL)**

<table>
<thead>
<tr>
<th>100% of FPL</th>
<th>400% of FPL</th>
</tr>
</thead>
<tbody>
<tr>
<td>$11,670 (Single)</td>
<td>$46,680 (Single)</td>
</tr>
<tr>
<td>$23,850 (Family of 4)</td>
<td>$95,400 (Family of 4)</td>
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</tbody>
</table>

• State and federal exchanges eligible for PTCs
  – Subject to ongoing federal court litigation challenge

* Household income: Modified adjusted gross income (MAGI)
Federal Exchange Litigation

**Halbig v. Burwell** | **King v. Burwell**
Challenged availability of premium tax credits through **federally-facilitated exchange** (FFE) and **partnership marketplaces** (“exchanges”)

- **4th Circuit: King v. Burwell**
  - Held that PTCs were available through **all** exchanges
  - **Supreme Court granted certiorari** on November 7, 2014

- **D.C. Circuit: Halbig v. Burwell**
  - 3-judge panel held that PTCs are available only for exchanges “established by a **state**”—July 22, 2014
  - Whole court (en banc) agreed to rehear the case December 17, 2014 (vacating three-judge panel’s ruling)
  - Case pended until Supreme Court rules in *King*

* Sylvia Burwell: Secretary, U.S. Department of Health and Human Services (HHS)
Tax Credit Cases

**Halbig v. Burwell** | **King v. Burwell**

Challenges to premium tax credits (PTCs) through federally-facilitated exchange/Marketplace (FFE)

- **ACA §1311**: “Each State shall...establish an American Health Benefit Exchange...for the State.”

- **ACA §1321**: “The [HHS] Secretary shall...establish and operate such Exchange within the State…”
Tax Credit Cases

- Code §36B(b)(2)(A) limits PTC availability to only taxpayers who enroll in exchange “established by a state”
- IRS Final Rule authorized PTCs from FFE
- Similar cases in federal district courts
  - Indiana (7th Circuit area): Argued; decision pending
  - Oklahoma (10th Circuit area):
    District court ruled against tax credits
      - Appealed to 10th Circuit
      - Oklahoma petitioned to be heard by Supreme Court with King → Denied
Tax Credit Case Outlook

Supreme Court granted *certiorari* November 7, 2014

Oral argument March 4, 2015; decision likely June 2015

<table>
<thead>
<tr>
<th>Arguments for Government:</th>
<th>Arguments for Challengers:</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Statute is unambiguous</td>
<td>1. Section must be read in context of whole statute (900 pages)</td>
</tr>
<tr>
<td>2. Statute is ambiguous</td>
<td>2. Agency ruling “reasonable,” so should be upheld (i.e., “Chevron” deference: courts defer to expert agencies)</td>
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<tr>
<td></td>
<td>Congress knows what it is doing when drafting text, and agency not given deference</td>
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</tbody>
</table>

**Meanwhile:** Tax credits allowed in FFE
2015 Outlook
# ACA Enrollment 2014

<table>
<thead>
<tr>
<th>As of November 2014</th>
<th>Overall Enrollment</th>
</tr>
</thead>
<tbody>
<tr>
<td>ACA expanded enrollment</td>
<td>20.6 million</td>
</tr>
<tr>
<td>Expanded Medicaid enrollees</td>
<td>11.0 million</td>
</tr>
<tr>
<td>Marketplaces enrollees</td>
<td>9.6 million (est.)</td>
</tr>
<tr>
<td></td>
<td>(6.7 million as of mid-November)</td>
</tr>
</tbody>
</table>

### How many paid for Marketplace plans?

- **8.3 million (approx. 94%)**

### PTC-eligible

- **87% (est.)**

### Off-Marketplace QHPs*

- **8.0 million (est.)**

### Previously uninsured

- **57% (est.)**

* QHPs: Qualified health plans
## ACA Coverage Expansion—2015

<table>
<thead>
<tr>
<th>As of February 2015</th>
<th>Open Enrollment Period</th>
</tr>
</thead>
<tbody>
<tr>
<td>ACA expanded enrollment</td>
<td>24.7 million</td>
</tr>
<tr>
<td>Expanded Medicaid enrollees</td>
<td>13.0 million</td>
</tr>
<tr>
<td>Marketplaces enrollees</td>
<td>11.7 million</td>
</tr>
</tbody>
</table>

### How many paid for Marketplace plans?

- **10.4 million (approx.)**

### PTC-eligible

- **87% (est.)**

### Off-Marketplace QHPs

- **8.0 million (est.)**
2014 vs. 2015

**Open Enrollment 2014**

- 8.02 million QHPs
- 7.08 million paid

**Open Enrollment 2015**

- 11.74 million QHPs
- 10.33 million paid

46% increase
# Open Enrollment

<table>
<thead>
<tr>
<th></th>
<th>Description</th>
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<tbody>
<tr>
<td><strong>2014</strong></td>
<td>October 1, 2013 – March 15, 2014</td>
</tr>
<tr>
<td><strong>2015</strong></td>
<td>November 15, 2014 – February 15, 2015</td>
</tr>
<tr>
<td></td>
<td>• Projection: CBO*: <strong>13 million</strong> vs. HHS: 9.1–9.9 million</td>
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<td>(Charles Gaba of ACASignUps.net: <strong>12 million</strong>)</td>
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<tr>
<td></td>
<td>• Outcome: As of February 15, 2015 → <strong>11.74 million</strong></td>
</tr>
<tr>
<td></td>
<td>• Intended to be October 1 – December 15</td>
</tr>
<tr>
<td></td>
<td>• Additional time for issuers to develop premium rates</td>
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* CBO: Congressional Budget Office
Special Enrollment Period

- **Tax Season Special Enrollment** → **47 states**
- [www.healthcare.gov](http://www.healthcare.gov) → **March 15, 2015 – April 30, 2016**
  
  For individuals:
  - Not enrolled in coverage for 2015
  - Can attest: Paid tax penalty for not having health coverage in 2014 with tax return
  - Can attest: First became aware of Shared Responsibility Payment after February 15, 2015 while preparing 2014 tax return

- **10 state exchanges have similar dates**
ACA Impact on Uninsured

Source: Gallup
## Lower Uninsured Rates

<table>
<thead>
<tr>
<th>State Category</th>
<th>% Uninsured</th>
<th>Changes</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Expanded Medicaid</td>
<td>16.1%</td>
<td>- 4.8%</td>
</tr>
<tr>
<td>• <strong>State or Partnership Exchange</strong></td>
<td>11.3%</td>
<td></td>
</tr>
<tr>
<td>With <strong>only one</strong> of the above or <strong>neither</strong></td>
<td>18.7%</td>
<td>- 2.7%</td>
</tr>
<tr>
<td></td>
<td>16%</td>
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### Notes:
- Expanded Medicaid
- State or Partnership Exchange
- Only one of the above or neither
Medicaid Expansion

By January 1, 2014 ➔ 24 states
Expanded Medicaid

By January 2015 ➔ 3 more states:
Michigan, New Hampshire, Pennsylvania
(Total 27)

After January 1, 2015 ➔ 1 more state: Indiana
(Total 28)

4 more states seriously considering expansion:
Alaska, Missouri, Montana, Utah
ACA’s Medicaid Expansion

February 2015

- No Expansion
- Expansion
- Expansion Since January 1, 2014
- Considering Expansion

◊ Considered expansion for 2015, but defeated by state legislature.
Pressures for Expansion

• 23 non-expansion states:
  – Forgo $423 billion federal Medicaid through 2022
  – Health systems could lose $167 billion in enhanced Medicaid payments
  – Could cover 6 million more uninsured people through expanded Medicaid

• Three largest health systems—Medicaid expansion states:
  – Hospital admissions: ↓ 10%–32%
  – Uncompensated care: ↑ 47%
ACA Reporting and Tax Forms
ACA Tax Reporting Regime

**Individual Mandate**
- Form 1095-A, Form 1095-B or Form 1085-C
- Form 8965, Form 1040

**Employer Mandate**
- Form 1095-C

**PTCs**
- Form 1095-A, Form 1095-C
- Form 8962, Form 1040
Tax Forms

**Form 1040**
- **Line 61** (New): Individual

**Form 8962**
- Premium tax credit

**Form 1095**
- **1095-A**: Marketplace coverage
- **1095-B**: Plan coverage (insured or self-funded employer plans)
- **1095-C**: Employer-provided coverage
Reporting Mandates

Minimum essential coverage

• **Issuers**—*Form 1095-A*
• **Plan sponsors**—*Form 1095-B*
  – Regardless of size
• **Employers**—*Form 1095-C*
  – Applicable large employers only (ALEs)

Employer Shared Responsibility

• **ALEs**—*Form 1095-C*
Individual Tax Returns

**Form 1040**
- **Line 61 (New):** Individual Mandate
- **Line 69 (New):** Net premium tax credit

**Form 8962**
Premium tax credit

**Form 8965**
Health coverage exemption
Information Returns

Form 1095

- 1095-A: Marketplace coverage
- 1095-B: Plan coverage (insured or self-funded employer plans)
- 1095-C: Employer-provided coverage

Form W-2*

- Box 12, Code DD: Cost of employer-sponsored health coverage

* Delayed for small employers (< 250 W-2s) and employers in self-insured church plans
W-2 Cost of Coverage
W-2 Reporting

Employers (e.g., local churches) required to report “cost” of health coverage on employees’ W-2s

- **January 2013** on secular, large employer W-2s

Temporary exemptions* remain for:
- **Employers in self-funded church plans** (unless church plan is subject to ERISA)
- **Small employers** (fewer than 250 W-2s)
- Union plans
- Health reimbursement arrangements (HRAs)

* Called “Transition Relief” in *IRS Notice 2011-28.*
W-2 Reporting

IRS may end exemption upon 6 months’ notice
- 2017 tax year likely (ahead of Cadillac Tax)
  - Notice 2015-16 hints exemption will end when Cadillac Plan tax regulations are final

- Cost of health coverage
  - For self-insured plans: §4980B(f)(4) “COBRA Rate”

- Church plans → exempt from COBRA
  - What about: blended rates, percentage of compensation, part of generalized church apportionment/assessment?

- Church Alliance comment letter
Cadillac Plan Tax
Cadillac Plan Tax

Excise Tax on high-cost plans: ACA Section 9001(a) …added Tax Code §4980I

- Applies to “employer-provided health plans”—self-insured or fully-insured
- Provided to employee, former employee (retiree), surviving spouse or other “primary insured”
- Towers Watson Survey:
  - 73% of companies are concerned about excise tax
  - 62% are using “glide paths” of plan changes 2015 – 2018
  - 48% likely to trigger excise tax in 2018
  - 82% likely to trigger excise tax by 2023
Cadillac Plan Tax—2018

Applies to fully-insured and self-funded plans

Assessed on “cost of coverage” for plans in excess of certain thresholds

- 40% excise tax on plan’s cost in excess of:
  - $10,200 for individual coverage
  - $27,500 for coverage “other than individual” coverage

- Increased threshold for plans that cover pre-Medicare retirees or employees in high-risk jobs
  - $1,650 individual or $3,450 family

- Adjusted for inflation (CPI-U*)+1% (2018-2020); CPI-U only after 2020

* CPI-U: Consumer Price Index-Urban
Notice 2015–16

- February 23, 2015
- Beginning of “regulatory conversation” with stakeholders
- Similar process used for ACA Employer Shared Responsibility Rule
- Future notices to follow before publication of proposed regulations
Cadillac Plan Tax

*Notice 2015-16* defines “applicable coverage” (subject to the Tax)

- Coverage under a group health plan provided by an employer that is excluded from taxable income under Code Section 106 or would be if it were paid by the employer

- Applicable coverage can be paid:
  - **By employer** with nontaxable dollars, or
  - **By employee** with pre-tax or after-tax dollars
Cadillac Plan Tax

Likely to be included:

• Employer and employee contributions to health flexible spending account (FSA)
• Employer and employee pre-tax contributions to health savings account (HSA)
• Health reimbursement arrangements (HRA)
• Where applicable:
  – Executive physical programs
  – On-site medical clinics
Cadillac Plan Tax

Likely to be **excluded**:

- Vision and dental benefits if “*excepted benefits*” either fully-insured or self-insured
- Employee after-tax contributions to HSAs
- Employee assistance programs (possibly)
- Long-term care insurance
Cadillac Plan Tax

• Cost of applicable coverage is:
  – Employer-paid portion and
  – Employee-paid portion (cafeteria plan) of:
    ➢ Premium cost for fully-insured plans
    ➢ “COBRA cost” for self-insured plans
      ➢ COBRA can be actuarial calculation, or
      ➢ Past cost basis—last 12 months

• HRAs—Two options under consideration
  • Amount newly available to employee each year or
  • Total amount spent by employer through HRAs divided by number of employees

• Applies only to coverage in which employee is enrolled, not simply offered
Cadillac Plan Tax

• Other items for implementing regulations:
  – Inflation adjustment in 2018 (possible)
    ➢ If per-employee cost of Blue Cross and Blue Shield option under FEHBP* for plan year 2018 exceeds such cost for plan year 2010 by more than 55%
  – Demographic adjustment factor probable
  – Geographic adjustment factor possible
• Unions benefit §4980I(b)(3)(B)(ii):
  – Union plans only subject to family coverage threshold—no matter the type of coverage

* FEHBP: Federal Employee Health Benefit Plan
Cadillac Plan Tax—Illustration

- Cadillac Tax
- Average UMC Plan
- Average Employer Plan
Account-Based Plans and Excepted Benefits
IRS Notice 2013-54: restrictions on health reimbursement arrangements (HRAs)

- No “stand-alone” HRAs for active employees
- HRAs allowed if “integrated” with group plan
  - Allows establishment of “private exchanges”
  - Prohibits combining HRAs with public exchanges
- Stand-alone HRAs allowed for “retiree-only” plans
  - However, no PTC for those retirees
    (i.e., no “double dip” on tax benefits because they have minimum essential coverage)
Employer Payment Plans (EPPs)

Restricts 1961 IRS rule (Rev. Rul. 61-146)—had allowed employers to reimburse premiums paid for individual health insurance policies on tax-favored basis (“employer payment plans”)

- Many local churches relied on this practice
  - Particularly for lay employees and part-time clergy (not in denominational plan)
- Individual policies (through exchanges or private market) can only be paid with increased taxable salary

* SHOP: Small Business Health Options Program

Marketplace plans generally cannot be paid tax-free:
- By employer, or
- Through cafeteria plan pre-tax (other than SHOP*)
ACA FAQ Part XXII

• IRS/DOL/HHS* repeat warnings on EPPs and HRAs with individual market and exchange policies/plans
  – ACA FAQ Part XI
  – Notice 2013-54
  – ACA FAQ Part XXII

• “Shot across the bow” for some vendors: Employer may not utilize a Section 105 plan or any other mechanism to reimburse employees on pre-tax or tax-free basis for individual health insurance premiums purchased on ACA Marketplace or off-Marketplace

* IRS: Internal Revenue Service; DOL: Department of Labor; HHS: Department of Health and Human Services
ACA FAQ Part XXII

• Taxable reimbursements disallowed:
  – Employer payment plan (EPP) that reimburses employee for premiums paid for individual plan also prohibited—even if treated as taxable income by ACA Market Reforms

• Paying employees with high claims to waive coverage under the employer’s health plan—prohibited under ACA and HIPAA

• Schemes for reimbursing individual health insurance premiums are “group health plans”
  – Must comply with health reform law mandates—even if employer has no involvement in choosing individual’s health coverage
Excise Tax Penalties

• Code §4980D
  – $100 per day per “affected individual” … can accumulate quickly!
  – Applies to church plans – no exemption

• ACA Market Reforms
  – No annual limit, no lifetime limit
  – Preventive health coverage with no cost-sharing

Penalties for violations—accrue to plan sponsor
Notice 2015–17

• **Repeats rule:** No employer payment plans taxable or nontaxable after **June 30, 2015**

• **However—provides transition relief:**
  No §4980D penalty for violations
  **January 1, 2014 – June 30, 2015**

• **One Employee Plan Exception**
Two Safe Harbors

- **Added Compensation:** Unconditional access to cash wages, not encumbered by the requirement to purchase health coverage.
- **Payroll Practice (DOL safe harbor):**
  - Employer makes no contributions—Payment is part of employee’s taxable salary being forwarded by employer to issuer
  - Employee participation is completely voluntary
  - Employer collects premiums through **payroll deduction**; remits them to issuer without endorsing the program
  - Employer receives **no consideration** (e.g., cash) other than reasonable compensation for administrative services
“Retiree-Only” Plans

- Group health plans **do not include** plan with “fewer than two current employees”
  - Mostly, these are “retiree-only” plans
- Exempt from ACA Market Reforms
  - **Key:** Exempt from annual limits prohibition
- Exempt from HIPAA (partly)

Medicare Exchange HRAs: OK (generally)
Areas of Concern

Certain types of individuals covered in plans for retirees…may cause plan to have more than one “current employee”

• **Long-term disabled covered**
  – ACA: FAQ temporary guidance from Departments (government) allows them in retiree plans

• **“Working aged”**
  – Retired-rehired (reappointed retired clergy)
  – Active employees age 65 and older
“One Employee” Exception

Strict reading of Tax Code (§9831): Employer plan with only one* employee may be exempt from ACA Market Reforms, i.e., not a “group” health plan

- **Example:** Plan of small local church with one clergyperson, no lay employees

Would permit **single employee** stand-alone HRA or EPP

- **Nontaxable** employer $ used to purchase individual plan (however → no premium tax credit according to IRS guidance)

- *Notice 2015-17* does not state this expressly, but appears to support this interpretation
  - Statements from IRS officials support, too

* Fewer than two “current employees”
Questions?
Center for Health