<u>Employers Beware</u>:
PPACA/Obamacare's True Costs May Be Surprising

(Full-Length Article)

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I'm sure by now, most employers have heard of the Patient Protection and Affordable Care Act (PPACA, now referred to as the "Affordable Care Act", or ACA) or Obamacare's Pay or Play rules. Hopefully most of you have been taking the time to learn about this cumbersome and costly healthcare law, because if you haven't sat down and taken the time to comprehend, make a plan, and see it through, you may have cost your firm thousands, even millions of dollars in future penalties, or will be paying at least that in healthcare costs for a lot more employees than you bargained for come 2014…

The problem is, from what I've seen, most employers don't take the time to dig into the details… Sure, many of you have sat through a lunch presentation or a thirty to fifty minute "overview" of the future healthcare law, but with this one, you can't just take the short, cliff-notes approach. By doing so, you could get seriously burned. *ACA's Pay of Play Rules, or Employer Shared Responsibility Rules, are challenging at best, with complex calculations, a myriad of rules and a confusing concepts that can result in huge penalties and costs if you don't do it right.* Some employers are just burying their head in the sand, thinking it will somehow pass over and go away… But unless you really, really learn the concepts, crunch the numbers and execute a game-plan, you could be facing the most costly mistake you'll ever make in your career…

I recently sat down with Marilyn Monahan, an employee benefits attorney from Monahan Law Offices in Los Angeles, and asked her thoughts on employer education related to ACA. "Employers need to stay informed about how the ACA impacts them and their employees so they can meet all of the compliance challenges they are facing, plan accordingly, and keep their employees informed of what it will mean to them," Marilyn specializes in PPACA and other employee benefit laws.

I think the best way to describe the complexity of ACA is to use an old saying my Algebra 1 teacher used with me when I was having a hard time grasping it… Algebra didn't come easily for me. And neither did the penalty calculations in the Employer Shared Responsibility rules. His best advice, best teaching, can be summarized in just a few of his words to me… ***"Learn the rules, play the game."*** This I applied over and over with Obamacare, because I just didn't understand the penalty calculations for the first two months after the rules were released. It took lots of repetition in reviewing the rules for me to grasp it.

To many employers, it's all just overwhelming. I asked MaryAnn Wessel, Vice President of EBA&M Corporation, a third party administrator for self-insured health plans in Costa Mesa recently, if she felt that the majority of employers out there actually understand the possible effects of PPACA and how much it could cost them if they don't learn about the law now and prepare. "No," MaryAnn replied, "I don't think most employers know or understand all of the ramifications and costs of PPACA." How has their reaction to the law been? "I think the best way to describe their reaction," MaryAnn replied, "is 'uncertainty'. Uncertainty about the future under this law, and most importantly, the potential cost."

Obviously, I can't get into all of the details in a short article in this publication. I'd either have most of it cut on the editing room floor, or you'd fall asleep half way through. So, instead, I'm going to give you enough information to understand that it's serious stuff, and hopefully, to convince you to go out and seek the details, because time is of the essence here, as we've already lost the first quarter of 2013, which could be one of your best look-back or stability periods…

What Does "Pay of Play" Do? **(The short version)**

The Employer Shared Responsibility Rules, known as Pay or Play rules, says that employers with 50 or more full-time employees must either provide minimum value essential health coverage (this means coverage with an actuarial value of at least 60% - paying at least 60% of the overall costs of care for your employees) to all of its full-time employees (defined as working 30 or more hours per week, not 40) that is affordable (with 3 safe-harbors, but generally speaking, with contributions of less than 9.5% of their income), or the employer will pay penalties. To avoid the "affordability penalties", your contributions should be based on the lowest paid workers in your organization.

There is relief for non-calendar year plans, assuming your employees were eligible for coverage as of 12-27-2012. In many cases, your compliance date will be your renewal date in 2014. However, there are rules for effective dates for those who were not offered coverage in the past. So, in some cases, even though your health plan renewal may be later in the year, you may have to comply as early as January 1, 2014 for individuals not offered coverage previously.

Types of Penalties

There are basically two types, or two prongs, of the Employer Mandate within the ACA. The first prong of the mandate applies if an employer is NOT OFFERING coverage to its full-time employees and their dependents. The first prong results in a possible penalty of $2,000 per full-time person. They do allow for the first 30 people to be subtracted from the penalty calculation, so if you have 100 employees, for penalty calculations, you would use the calculation 100-30 = 70 x $2,000 = $140,000 in penalties. For "smaller" large firms, or mid-size firms, that doesn't sound like all that much in penalties, but in "larger" large firms, it becomes overwhelming. Consider an employer that now employs 800 people, but previously only covered 200 of them, due to old eligibility rules of 40 hours, seasonal or part-time workers, or other situations. With this new healthcare law, such an employer may end up having to add up to 600 people onto its health plan, or pay the $2,000 penalty, which could be applied to up to 770 employees (800 less the first 30, which are forgiven in the penalty calculations) of them (if you do the math, the penalty could be as high as 1.54 million per year). The penalty is bad… the cost of adding possibly 600 new employees (and perhaps dependents) onto the plan could literally bankrupt some companies. So, you may want to think of all your options, not just the most obvious ones.

In a nut-shell, if a large employer has only offered coverage, for example, to some of its workforce in the past, and now must either offer coverage or pay a penalty per person, that employer must figure out which penalties apply under which circumstances (which is not at all easy), in order to make a qualified decision about whether to pay or play. I personally know of employers who will need to add literally HUNDREDS of employees to their health plan, right here in Orange and San Bernardino Counties, or pay MILLIONS of dollars in penalties, come 2014!

The second type, or the second prong of the mandate occurs when an employer offers coverage, but it's "unaffordable," meaning that the employee contribution of the lowest cost self-only plan exceeds 9.5% of the employee's household income, or does not provide "minimum value" (fails to pay at least 60% of the cost of benefits). If the coverage is deemed unaffordable, the penalties are $3,000 for each employee that goes to the exchange and is deemed as eligible to purchase coverage with a tax subsidy. So, if 26 people went into the Exchange and were approved for coverage, the employer would face a penalty of 26 x $3,000 = $78,000.

Importance of Look-Back and Stability Periods

Employers are offered an optional Safe Harbor Approach, known as the optional "look-back/stability period safe harbor" to determine whether ongoing employees are full-time employees for the purpose of calculating penalties. This is now referred to as the "look-back measure method." Under this method, an employer would determine each ongoing employee's status as full-time by looking back at a defined period (not less than 3 but not more than 12 consecutive calendar year months), the standard measurement period, as chosen by the employer, to determine whether the employee was employed on average at least 30 hours of service per week. This method can also be used for variable hour and seasonal employees. If such employee has worked full-time during the standard measurement period, you must treat that employee as full-time for the "standard stability period" (which is the greater of 6 months or the length of the standard measurement period).

What this means is, if you do nothing, and you don't educate yourself on this, and soon, your number of full-time employees may be much greater than you think, meaning you will end up paying for coverage for many more employees than you budgeted for, or pay much higher penalties than you may have considered.

***Ways a Small Employer May Be Deemed a Large Employer* (and must provide coverage)**
Quite often, I've seen, small employers think they are safe from the mandate, because they are small. In many circumstances, that is true. However, in some circumstances, that is not true. In the case of an employer that has 35 full-time employees, they may not be considering their "other" employees, such as their part-time employees or their seasonal workers. Well, PPACA has considered them, and they can hurt you, if you simply bury your head in the sand, and not understand that under the Employer Mandate, you must also look at those part-time employees and/or seasonal workers, to determine if you're deemed a large employer. Under the law, you must also calculate the number of FULL-TIME EQUIVALENTS, meaning that you have to add them all up properly and determine the amount of part-timers that become full-time under the law, and how those numbers can often put you up over the 50 full-time employee mark. Your seasonal workers can also hurt your counts, and put you in a position of being required to offer coverage for all of them. You must be aware of these concepts, and apply the rules (yes, *learn the rules, play the game*) to see where you stand. The calculations are complicated and cumbersome, but absolutely necessary. Under some circumstances, you may need to do what we call an "Impact Study" to assist you in this process. Impact studies are now being performed by many consulting and actuarial firms.

To determine if you do become a large employer under the law, and subject to the employer mandate, you are allowed to choose a" look-back" and "stability" period in the preceding year (2013), but understand, again, as mentioned at the beginning, we've already lost the first quarter of 2013, so you now have fewer months from which to choose the best look-back periods and stability periods to determine your future destiny under ACA. The longer you procrastinate, the less choices you'll have.

Small employers' ownership may also put them in danger of the employer mandates applicability, due to common ownership with other firms. See the Aggregation Rule information below.

It is important to those employers who may be close to the 50 mark in employees to know exactly what to do, how to count, how to calculate the part-time equivalents that must be added together to show the number of full-time equivalents, when to apply seasonal workers, etc., early enough in 2013 to plan accordingly for ACA. There are things you can do to be better positioned; you just need to know your options and how to implement in time.

Aggregation Rule – Counting your Affiliated or Related Companies
The Employer Shared Responsibility rules also clarified that "related" employers (i.e., employers with common ownership) must be aggregated together to determine whether the employers, collectively, employ more than 50 full-time equivalent employees. So, if you are an owner in 2 or 3 companies, even if they are not in the same business, you will need to add up all of the employees, and if the total of all employees of all the related firms exceed 50 FTE's, all three small companies will be deemed a large employer under the law, and each will be subject to the mandate. For example, if John Smith owns an interest in a small, 10 person dry cleaner, but also has ownership in a 35 employee professional business and a 15 person restaurant, all three companies would be added together, and since the number of total employees exceeds 50, all three businesses (independently small employers) must provide health insurance to their employees in 2014. It does, however, allow penalties to apply only to the employer(s) violating the law. So, if the professional business offers coverage and the restaurant offers coverage, but the dry cleaner does not, only the dry cleaners would be subject to the penalties.

De Minimus Rule
There is a De Minimus rule that may come into play, which allows an employer that offers coverage to all but 5% of its full-time employees (and their dependents), or if greater, 5 of its full-time employees, it will be treated as offering coverage. So, there is a break for those companies who cover the large majority of its workers.

***Definition of Dependents* (does not include spouse)**

The Department of Treasury interpreted its full-time employee and dependents as not being limited to the full-time employee only. Under a much more liberal definition than we originally saw, the definition of dependents (not defined in the statute itself), ***Treasury defined the definition of "dependents" as an employee's child who is under 26 years of age.*** Note that this definition does <u>not</u> include spouses. Comments in the regulations provided reasoning for this, indicating that the spouse should have coverage under his or her own employer (if employed), or if not, may be eligible for a tax credit in the Exchange, if other minimum essential coverage is not available. This could lead to companies changing their definition of qualified dependents to exclude spousal coverage.

Why Timing is So Important
Employers need time to figure out their best options. They need to decide, before their seasonal peaks, etc, in 2013, what the best time is for them to choose their look-back and stability periods. For those with seasonal workers, say in summer and winter, you have likely already lost your winter months… If you don't act now, you could also lose your summer seasonal months and peak employee periods as months to avoid in your calculations and look-back and stability periods. In other circumstances, you may want to reduce the number of hours for some populations to part-time employment under 30 hours. You need to act now, decide and implement, before it's too late!

"Planning is essential" stated Marilyn Monahan in my recent interview… "Employers—whether large or small—will be better prepared to address the challenges of the ACA provisions that go into effect in 2014 if they start planning in 2013."

Non-Deductible Penalties
It is also crucial to note that all penalties under the Employer Mandate ***ARE NOT TAX DEDUCTIBLE***. In the finance world, that means that if you choose not to offer coverage to your full-time equivalents, and let's say that number is 600 employees, you would be subject to a penalty that is in accounting terms, twice the value of the penalty… 600 employees – 30 forgiven employees = 570 employees x $2,000 = $1,140,000 in penalties, which has an accounting value of twice that (ie no deductibility), or $2,280,000.

Confusion in the Numbers
Is it confusing to calculate the penalties and do a true assessment of where you are? Absolutely. The rules are confusing, and there are formulas you must follow. Far too detailed to get into, as I said, in this article, but *you need to learn the rules and play the game*.

Other Fees/Excise Taxes in Obamacare
It's important that you understand that this law has a number of fees, taxes, assessments, etc., built in, all designed to raise revenues to *PAY FOR* the new healthcare law. Obviously, for employers that don't "play", they will "pay" the penalties described (in brief – note that the complexity of the penalties is far too complex to describe in an article). In addition to that, however, there were a number of other fees or taxes in or about to be put in place.

First, it's important to remember that the reason, as you'll recall, that the Supreme Court (SCOTUS) ruled last summer that ***the individual mandate was constitutional***, was because, in fact, they said ***PPACA is a TAX LAW.*** So, let's not forget that. And realize that someone, i.e., us Americans paying taxes, have to pay for the cost of this new healthcare plan, including the multi-billion dollar administrative costs of setting up State Exchanges. Note that California's Exchange (Covered California) is alive and well, and will kick off its first enrollments on October 1, 2013. You will start seeing heavy advertising by this summer (all paid by American Tax-payer dollars).

I'm not saying it's all bad. The tax subsidies will definitely help many lower income individuals and families afford health coverage, and it should get more people enrolled. The concerns of the industry, however, include things like adverse selection (the young, healthy ones may opt to pay the penalty instead of enroll, leaving the older or sicker individuals in the risk pools), and even the possible shortage of primary care physicians.

Overall taxation/fees, include a **Medical Equipment Tax** that will be added to all new medical equipment for medical equipment manufacturers; taxes that will be passed on to providers, who will then pass those costs on to those who pay premiums or purchase healthcare. Next, you'll all likely recall the Fiscal Cliff controversy over Medicare taxation on 1-1-2013. That resulted in a **Medicare Tax increase to all individuals earning $200,000 or more and $250,000 per couple beginning in 2013**, which applies after their Medicare threshold is met. Medicare payroll tax will increase by 0.9% from 1.45% to 2.35%. Next, you'll recall that **cafeteria plans are now capped at $2,500** (to be indexed) in 2013, which could result in higher taxes for many individuals who use the Cafeteria Plans of their employers.

There is also the annual **Transitional Reinsurance Program**, which will go into effect in November, 2014, with a **per participant tax of approximately $63 per person**, to be used to fund the uninsured pool in America (I have plenty to say on that topic, on how that amount per person realistically will *not* come anywhere *NEAR* funding that pool, which will likely result in drastic increases each year, but I am trying to stay focused on other issues in this article). Some employers, particularly self-insured employers, are likely to start charging that fee back to its employees for each member of their families beginning in fall, 2014. Once employees start seeing the costs affect their wallets, they may start to understand the true costs and implications of ACA.

The **Comparative Research Fee** applies to plan and policy years ending on or after October 1, 2012, and before October 1, 2019. This is a **$1 per covered life for 2012, and $2 per covered life in 2013** (indexed in the future). This must be paid consistent with the timing of your 5500 filings… ***Self-insured plans, beware, because this means January 1 renewals need to file and pay their first set of fees with an IRS Form 720 due by July 31, 2013!*** We don't know exactly how fully insured carriers will handle this fee, but it is likely going to be added to your premiums.

Will Overall Costs Increase in 2014 and Beyond?

I don't think that there is a person in the industry who doesn't think that this law will definitely result in overall healthcare premiums rising. News reports talk about it daily. The Department of Insurance is constantly battling carriers on their proposed premium increases, and 2014 isn't here yet. The bottom line is, there is nothing in this law that contains cost. It's all about adding benefits, and it's not about driving costs down.

HHS Secretary Kathleen Sebelius acknowledged on March 26, 2013, that premiums could rise next year for individuals buying health insurance, especially for young men and young adults (those most likely to choose to pay the penalty rather than the insurance premiums in 2014, and those who we most need in the risk pools due to their low claims expense). On that same day, the Society of Actuaries released a study which estimated that individual insurance premiums will rise 32% over the next three years, due to more patients entering the insurance market and receiving care on conditions which have gone untreated in the past, plus increasing costs for preventive care. On March 28, Milliman released a report to Covered California (details below) which estimated a 20% increase for individuals above the 400% of the federal poverty level next year.

In the group market, we've seen premiums continue to rise, to the point that many employers are questioning their future ability to offer coverage at all. And now with the Employer Mandate looming, it is possible that employers may choose to pay the penalty rather than offer coverage, especially for certain groups of employees, such as the lowest paid workers, to let them take advantage of the subsidies in the individual market. Small employers, though not required to offer health coverage in 2014, are also considering dropping group coverage. Can employers afford these increases? "Every year we are hit with a 10-15% increase and the company absorbs it to protect our employees. With the changes in 2014 looming I don't see any way we, as a small employer, can continue to absorb the premium increases. We have lowered the plan benefit and gone to smaller networks, to try to maintain costs," commented Kathryn Kingston, Accounting & Human Resources Manager at PVA Tepla America, a small employer in Corona, recently. "We can't go much lower now [on benefits] so now we will be forced to pass on the rate increases to the employee, and that means it will cost them more out their pocket just for the premium. As a small company, we must seriously look at what is best for our employees…and whether or not we even offer an insurance plan." On the topic of cost containment, Ms. Kingston commented: "Any good and successful plan must contain or mitigate costs. Where is the cost containment measure in Obamacare?" That is, indeed, a key question. However, the vast majority of employers have realized that they still want to offer health coverage to their employees, for the same reasons they did initially; to provide a good benefit to their employees, to recruit, hire and retail quality employees, etc., and for the principal of not wanting to pay penalties that are non-tax-deductible. They just need to do whatever they can to keep their exposure as limited as possible regarding penalties.

Exchanges

Beginning January 1, 2014, all Americans are supposed to have health insurance, or pay a penalty (i.e the individual mandate). PPACA requires each state to create its own, or participate in federally-based Health Exchanges or partnership exchanges, which are web-based portals where individuals and small employers can shop for health coverage starting in 2014. On the individual side, qualified individuals, who are not eligible for coverage under an employer-based health plan that is affordable, can purchase health insurance in the Exchange and may be eligible for Premium Tax Subsidies. The subsidies are not available for all ages and income. They are designed to assist lower income individuals, who fall between 133% and 400% of the federal poverty level. It's important that employers understand how the exchanges will work, the types of individuals who may qualify for subsidies, and how to educate and communicate to their employees *before* the advertising begins this summer. Tax subsidies are of course paid by tax-payer dollars.

A new Milliman report, commissioned by Covered California, the California Exchange, was released on March 28, 2013. This report shows that those individuals *with incomes less than 400% of the FPL purchasing an individual health plan next year are likely to pay about 47% to 84% less in monthly premiums compared to 2013* (because of the subsidies/tax credits they would be eligible for). In other words, although the full cost of the premiums will be more than 2013, the cost to the individual after the subsidy would reduce their premiums to the amounts stated in the range above. The study also concluded that those earning *above* the 400% of FPL may see a cost *increase that would average 20%* due to increases in their monthly premiums but would be partially offset by reduced out-of-pocket cost. That is projected for 2014. We have no information yet on what will happen in subsequent years.

It's important that employers learn about how the Exchanges will work, because if they don't, they could be shocked to discover that their employees could be seeking subsidized coverage in the Exchanges, which could result in additional penalties for the employer.

Summary/Action Plan for Employers

There are many action items that employers must accomplish in order to comply with and be ready for ACA in 2014, so start now! First, you must determine if you are a large employer under the law (again, not an easy task for some companies). If you are a small employer, you will not be subject to penalties, but if you are deemed a large employer, given many items, including those briefly mentioned above, you could be subject to penalties if you don't offer minimum essential coverage that is affordable to your employees in 2014. Once you know you're a large employer under the law, you may need to think about employee job titles and hours, reductions in hours perhaps to some classes of workers, or perhaps increases in pay to meet the affordability safe harbor. Next, you need to know your effective date for ACA. Most importantly, you will have to decide to "Pay or Play". Sounds simple, but it is far from that.

"The health care reform law is complicated and places many new compliance burdens on employers", says Ms. Monahan. "In addition to new provisions employers must implement this year, employers must start planning for 2014 in 2013. Small employers will want to understand how the Exchanges work and the new coverage options that will be available to them. Large employers will want to analyze their existing plan terms and demographics to determine what impact the pay-or-play penalties may have on them, and what steps they may want to take to mitigate that impact. HR will not be able to do this alone; in addition to seeking help from outside consultants, HR needs to engage the CEO and CFO in the planning, implementation, and budgeting processes."

When I asked MaryAnn Wessel what she felt the number one most important thing that employers need to know about PPACA, she responded: "As a TPA, we think the most important thing an employer needs to know is the actual timeline for the various provisions to go into effect. This is the basic starting point and unfortunately, many employers are still confused as to what provisions apply to their particular plan."

So, take the advice of professionals like MaryAnn and Marilyn, as well as myself, and consider that your best investment in 2013 could be your education in ACA. Get trained soon, *learn the rules, play the game,* make your decisions, and implement. It all starts with knowledge. You need it to mitigate the potential financial impact of ACA on your company. Without knowledge, many employers will be unexpectedly and immensely burdened by the requirements and possible penalties of ACA. Act now, before it's too late.

About the Author

Dorothy M. Cociu, RHU, REBC, GBA, RPA, President of Advanced Benefit Consulting & Insurance Services, Inc., is an employee benefit consultant specializing in federal and state health benefit laws and regulations, including PPACA, HIPAA, ERISA, and COBRA. She is a highly-respected expert on PPACA and has been providing Employer Training on PPACA since the law's passage. She is offering continuing public educational training seminars and workshops in Southern California throughout 2013, to help prepare employers for their implementation of ACA. Handouts, including an action plan and timeline, as well as other valuable tools, are provided to attendees. Mention this article for a training seminar/workshop discount, or enter discount code ACAARTICLE0413 for a discount rate of $89. For more information, visit her website at www.advancedbenefitconsulting.com, or email her at dmcociu@advancedbenefitconsulting.com.