STATUS OF ACA – THE RASH THAT WON'T GO AWAY

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I. LATEST PROPOSALS IN CONGRESS

The Republicans in Congress have been trying since the enactment of the Affordable Care Act to repeal the Affordable Care Act ("ACA"). With the election of President Trump in 2016 and the Republican's controlling both the House and Senate, the repeal of the ACA should have been a slam dunk. Contrary to the repeal efforts prior to the 2016 presidential election, the Congressional Republicans have been unable to unify around the repeal efforts.

President Trump has executive action without the assistance of Congress.

A. Executive Orders and Announcements.

1. President Trump signed an Executive Order on October 12, 2017 authorizing certain changes to the ACA. Among the changes are the following:

a. The order directs the Secretary of Labor to consider expanding access to Association Health Plans ("AHP"s), which could potentially allow American employers to form groups across State lines.

A broader interpretation of the Employee Retirement Income Security Act ("ERISA") could potentially allow employers in the same line of business anywhere in the country to join together to offer healthcare coverage to their employees.

It could potentially allow employers to form AHPs through existing organizations, or create new ones for the express purpose of offering group insurance.

Employers participating in an AHP would not be able to exclude any employee from joining the plan and cannot develop premiums based on health conditions.

b. The order directs the Departments of the Treasury, Labor, and Health and Human Services to consider expanding coverage through low cost short-term limited duration insurance ("STLDI").

STLDI is not subject to the ACA mandates and rules. The Executive Order referenced one study that found that on average STLDI costs one-third the price of the cheapest ACA Marketplace plans.

The main groups who benefit from STLDI are people between jobs, people in counties with only a single insurer offering exchange plans, people with limited coverage networks, and people who missed the open enrollment period but still want insurance.

c. The order directs the Departments of the Treasury, Labor, and Health and Human Services to consider changes to Health Reimbursement Arrangements (HRAs) so employers can make better use of them for their employees.

HRAs are employer-funded accounts that reimburse employees for healthcare expenses, including deductibles and copayments on a tax-free basis.

2. On May 4, 2017, President Trump issued an Executive Order directing the Secretary of the Treasury, the Secretary of Labor, and the Secretary of Health and Human Services to consider issuing amended regulations, consistent with applicable law, to address conscience-based objections to the preventive-care mandate.

3. In response to the May 4, 2017 Executive Order, the Secretary of the Treasury, the Secretary of Labor, and the Secretary of Health and Human Services issued interim final rules on October 6, 2017, that provide conscience protections to Americans who have a religious or moral objection to paying for health insurance that covers contraceptive/abortion services.

Under the first of two companion rules released, entities that have sincerely held religious beliefs against providing such services would no longer be required to do so. The second rule applies the same protections to organizations and small businesses that have objections on the basis of moral conviction which is not based in any particular religious belief.

4. On October 13, 2017, President Trump announced that his administration will stop paying cost-sharing reduction ("CSR") payments to health insurers. The CSR payments are used by the insurance companies participating in the health care marketplace to reduce out-of-pocket costs for low-income individuals.

The CSR payments have been in dispute for a number of years. The Republican-controlled House of Representatives sued the Obama administration in 2014, arguing the payments were illegal since they were being appropriated by the executive branch instead of Congress, which never authorized them. In order to keep the initial cost of the Affordable Care below the promised one trillion dollars for its first ten years, the Democratic-controlled Congress wrote the ACA to require the annual CSR appropriation as opposed to including required annual funding.

A federal court ruled in favor of the House, but the Obama administration appealed the ruling, allowing the payments to continue. The Trump administration had previously allowed the continued payment of the CSR while the case was on appeal and appropriated the payments on a monthly basis, attempting to use it as leverage in multiple negotiations with Democrats.

In August, a federal judge ruled that 17 states and the District of Columbia could continue the lawsuit even if the Trump administration pulled out of the appeal since the end of the payments would directly affect residents. This could allow the payments to continue despite the announced decision to end them.

B. Democrat Party Solution to the Health Care Problem.

The Democrats want to fix the errors in the ACA. One of the big fixes relates to the CSR payments that the law requires annual appropriations for. Longer term, they have other ideas on dealing with health care.

On September 13, 2017, Senator Bernie Sanders introduced the Medicare for All Act of 2017. In his press conference on introducing the bill, Senator Sanders was accompanied by 1/3 of the Senate Democrats. Senator Sanders did not have any co-sponsors when he introduced a similar measure in 2013. He had 16 Democratic co-sponsors for his current proposal, including several other high-profile Democratic senators who are being talked about as potential 2020 presidential candidates. Expect this issue to gain steam by the Democratic presidential candidates as we move closer to the 2020 presidential elections.

Although the plan is called "Medicare for All," it is really just a slogan. The plan would greatly expand Medicare and overhaul it. It would greatly expand the type of coverage offered and also eliminate deductibles, copays and premiums. Although private insurance companies are currently a part of the Medicare system, the proposed plan would eliminate private insurance companies.

There's no exact plan for how to pay for Sanders' bill, but Senator Sanders did release a list of potential payment options. Among the proposals: a 7.5 percent payroll tax on employers, a 4 percent individual income tax and an array of taxes on wealthier Americans, as well as corporations. In addition, the Senator said the end of big health insurance-related tax expenditures, like employers' ability to deduct insurance premiums, would save trillions of dollars. In a 2016 report on his presidential campaign's "Medicare for All" plan, the Urban Institute estimated that the plan would cost $32 trillion over 10 years.

The Medicare for All Act of 2017 will not have any chance of being enacted into law during the current Republican administration.

II. GROWING UP TO BE A LARGE EMPLOYER

While many of us have been crossing our fingers, hoping that the Affordable Care Act's employer reporting and shared responsibility penalties would be repealed, many small businesses have crossed the threshold to applicable large employer (ALE) status as a result of hiring or business ownership changes. A business that averaged 50 or more full-time employees (including full-time equivalent employees) in 2017 is an ALE for reporting and penalty purposes in 2018. The ALE determination is made looking at prior calendar year data.

A. Determining whether a business is an ALE is a four-step process:

1. **First**, for each month in 2017, count the number of employees who were employed to work on average at least thirty hours per week. Count all full-time common law employees (including seasonal employees) who work for all entities treated as part of the same controlled group or affiliated service group.

2. **Second**, for each month of 2017, add the total number of hours for all other employees not counted in step one and divide each

monthly sum by 120 – the result is the number of full-time equivalents for each month.

3. **Third**, add the results of steps one and two to obtain twelve sums, one for each month of 2017.

4. **Fourth**, determine the average of the sums obtained in step three by adding them up and dividing by twelve (do not round up). If the result is less than fifty, you are not an ALE. If the result is fifty or more, there is another step: you still might not be an ALE if you had more than fifty employees for no more than four months during 2017 and you exceeded fifty in those months due to your seasonal employees.

If the business has crossed the threshold to ALE status, the company is vulnerability to the (nondeductible) employer penalties. If the company does not offer group health coverage in 2018 to at least 95% of its full-time employees (and their children) and a full-time employee obtains subsidized "Marketplace" coverage for a given month, the business will be subject to a penalty equal to $193.33 per full-time employee in excess of 30 for that month ($2,320 per year) (Penalty A). Alternatively, if the company did offer group health coverage to at least 95% of its full-time employees (and dependents) but a full-time employee declined your coverage and instead obtained subsidized Marketplace coverage for a given month, the business will be subject to a penalty for that month equal to the lesser of the Penalty A amount or $290.00 ($3,480 per year) for each full-time employee who had subsidized Marketplace coverage (Penalty B).

A full-time employee can obtain subsidized Marketplace coverage and trigger the employer penalty for a given month if the employer did not offer group health coverage that meets the minimum value and affordability tests.

An ALE that escapes the penalty still is subject to the ACA's Form 1094/1095 employer reporting requirements.

III. ACA PENALTIES – 1094/1095, ASSESSMENTS AND ERROR REPORTS

A. Form 1094/1095 Reporting and Disclosures.

1. **In general:**

a. ***For Small employers with fully-insured group health plan,*** the carrier will prepare, distribute to employees, and transmit, as appropriate, the Forms 1094-B and 1095-B.

b. ***For Small employers with self-funded group health plans,*** the plan itself is the issuer of coverage. The employer/plan sponsor will need to prepare, distribute to employees, and transmit, as appropriate, the Forms 1094-B and 1095-B.

c. ***For Large employers (including employers with 50-99 FTEs) that maintain fully-insured group health plan*** the employer must prepare, distribute to employees, and transmit, as appropriate, the Forms 1094-B and 1095-C.

d. ***In* the case of a large employer that maintains a self-funded group health plan,** the employer will prepare, distribute to employees, and transmit, as appropriate, the Forms 1094-C and 1095-C (including Part III), which will include the information ordinarily included in the Forms 1094-B and 1095-B.

2. There are also special rules in the instructions if the employer maintains a health reimbursement plan or when employees have been offered COBRA.

3. For multiemployer plans, the employer can take credit for the union employees eligible under the plan. There are specials codes to use in completing the Form 1095-C.

4. Detailed information will be needed to prepare the Form 1095-C. Employers need to review the forms and instruction and determine how they will be able to obtain this information to report to the IRS.

B. Form 1094/1095 Electronic Reporting Requirements.

1. If the employer is not using a service to prepare the required filings, you should note that employers that are filing 250 or more forms 1095-C must file electronically.

2. These employers must file under the IRS Affordable Care Act Information Returns System (AIR).

3. Employers who utilize a payroll vendor, CPA, or other entity may have a limited role in the filing process if the third-party is considered a transmitter. Employers should confirm with the entity that it is the transmitter and that the employer will not be obligated to complete the electronic filing application process.

4. Employers who process payroll in-house that plan to file the forms on their own should familiarize themselves with IRS Publication 5165.

C. Form 1094/1095 Reporting Requirements – Controlled Group Issues.

1. Each entity in the controlled group must issue its own Forms W-2 to its employees. When employees work for multiple employers in the

controlled group, separate Forms W-2 must be issued by each employer.

2. Each entity in the controlled group must issue its own Forms 1095-C to the employees. This rule applies even if the entities in the controlled group all participate in the same group health plan.

3. When an employee works for and is paid separately by more than one entity in the controlled group, separate FICA, FUTA and SUTA wage bases apply.

4. We have seen a number of employers using captive administrative service companies for all of its employees to avoid all of the separate filing requirements.

5. The captive service company is the common law employer of the employees and it retains the sole authority over the assigned employees. The captive service company contracts with the various employers in the controlled group to provide employees.

6. The captive service company handles all human resources and employee administrative functions. All reporting is handled by the captive administrative service company.

D. Form 1094/1095 Reporting Deadlines.

2018 ACA Reporting Deadlines

ACA Requirement	**Deadline Date**
1095-C forms delivered to employees	1/31/2018
Paper Filing All with IRS	2/28/2018
eFiling All with IRS	4/02/2018

E. ACA Assessments and Error Reports.

1. Overview of Required Reporting. IRC §6055 applies to providers of minimum essential coverage (MEC), which generally includes health insurance issuers, self-insured plan sponsors and government-sponsored programs. IRC §6055 reporting will be accomplished using Forms 1094-B and 1095-B.

   IRC §6056 applies to applicable large employers (ALEs) subject to the ACA's employer shared responsibility rules. Under IRC §6056, ALEs will use Forms 1094-C and 1095-C to satisfy their reporting obligations.

2. The IRS May be Looking for You. The IRS has started sending out letters to potential non-compliant Applicable Large Employers using IRS Letter 5699. This letter requests missing ACA information from potentially non-compliant ALEs based on 2015 W-2 data. IRC §6056 requires ALEs to file ACA information returns with the IRS (Form 1094-C) and provide statements to full-time employees relating to the health insurance coverage offered (Form 1095-C).

   The IRS will use the information provided by the taxpayer in its response to the IRS letter to identify ALEs that failed to file reports in violation of IRC §6056 and assess penalties.

3. The employer may be notified that is ACA filing was accepted with errors. The IRS requires correction to the errors it has identified and that a copy of the corrected return should be furnished to the recipient.

   Many times the payroll records do not match the information contained in the Social Security Administration ("SSA") records.

Employers can use the SSN Verification Service to verify that the employee and Social Security Number match the SSA records.

F. Penalties. A reporting entity that fails to comply with the IRC §6055 or IRC §6056 reporting requirements may be subject to the general reporting penalties under the tax code for:

1. Failure to file correct information returns (under IRC §6721); and

2. Failure to furnish correct payee statements (under IRC §6722).

Penalties may be reduced if the reporting entity corrects the failure within a certain period of time. In addition, lower annual maximums apply for reporting entities that have average annual gross receipts of up to $5 million for the three most recent taxable years.

G. Adjusted Penalty Amounts. Effective for returns and statements required to be filed in 2016, the Trade Preferences Extension Act of 2015 significantly increases the penalties for reporting entities that fail to comply with the IRC §6055 or Section 6056 reporting requirements. The increased penalty amounts are as follows:

1. General penalty amount:

    a. $250 for each return (increased from $100), up to an annual maximum of $3 million per calendar year (increased from $1.5 million).

    b. The annual maximum for employers with up to $5 million in annual gross receipts is $1 million (increased from $500,000).

    c. Violations corrected within 30 days (Large Employers): $50 for each return (increased from $30), up to an annual maximum of $500,000 per calendar year (increased from $250,000).

d. Violations corrected within 30 days (Small Employers): $50 for each return (increased from $30). The annual maximum for employers with up to $5 million in annual gross receipts is $175,000 (increased from $75,000).

e. Violations corrected before Aug. 1: $100 for each return (increased from $60), up to an annual maximum of $1.5 million per calendar year (increased from $500,000). The annual maximum for employers with up to $5 million in annual gross receipts is $500,000 (increased from $200,000).

f. Violations due to intentional disregard: $500 for each return (or, if greater, 10 percent of the aggregate amount of the items required to be reported correctly) (increased from $250), with no annual maximum.

All numbers subject to cost of living increases.

H. Non-Compliant Employer Case Examples.

1. Example 1 – ABC Manufacturing Company offered health insurance during 2015 to its 110 employees that was not considered affordable as defined by ACA. The Owner of ABC decided not to increase the employer health insurance subsidy to make it “affordable” under the ACA. It was also decided not to file the 1094-C nor provide 1095-C forms to employees for the 2015 nor 2016 reporting years because everyone expected the ACA to be repealed.

The penalties for not reporting by the deadline for 2015 reporting would amount to $250 for each form ($250 x 110 employees = $27,500). In addition, the failure to send the Forms 1095 to the ABC employees would amount to another $250 for each form ($27,500), for a total of $55,000.

If the IRS determines that ABC's failure to file and send Forms 1095 to its employees was an intentional disregard for the mandate, the penalty rises from $250 to $500 per form, totaling $55,000. So, for reporting year 2015, the penalty alone could be as high as $110,000.

For reporting year 2016, the same penalty would be assessed ($1,000 x 110) for a grand total of $220,000 in penalties for both reporting years, if intentional. The penalty for 2016 will only be $55,000 if not intentional.

In addition, the IRS assessment for not providing affordable health insurance would also be applied.

2. Example 2 – XYZ Service Company offered health insurance during 2015 that was also not affordable as defined by ACA. The Owner of XYZ did not increase its health insurance subsidy for the insurance to make it "affordable" under the ACA. However, it did file the Form 1094-C to the IRS, and it provided Forms 1095-C forms to its employees for both reporting years.

   There would be no reporting penalties imposed on XYZ because it reported to the IRS on time and further complied by sending Forms 1095 to its employees. XYZ will only be responsible for the IRC 4980H "Pay or Play" penalty for the failure to offer affordable health insurance.

IV. 2018 RATES AND PENALTIES

A. Affordability Percentage – 9.56% for 2018 (down from 9.69% in 2017).

B. Affordability Amount under FPL Safe Harbor - $96.08 for 2018 (down from 97.38 in 2017).

C. Employer Mandate "A" Penalty - $2,320 ($193.33/month) (up from $2,260 in 2017).

"A" penalty (IRC 4980H(a)) – applies if an employer does not offer at least "minimum essential coverage" (MEC) to at least 95% of full-time employees, and at least one full-time employee buys health insurance in the Marketplace and receives a subsidy. The original penalty amount in 2015 was $166.67/month times the total number of full-time employees the employer had in that month (minus 30 employees), times 12 for the entire year. (12 x $166.67 is $2,000.04).

D. Employer Mandate "B" Penalty – $3,480 ($290/month) (up from $3,390 in 2017).

"B" penalty (IRC 4980H(b)) – applies if an employer offers coverage to employees, but for one or more full-time employees the coverage is either not "affordable" or does not meet "minimum value." The original penalty amount in 2015 was $250/month for each full-time employee for whom coverage was either not affordable or did not provide at least minimum value. (12 x $250 = $3,000). An important difference from the "A" penalty is that the "B" penalty calculation does not include all full-time employees, but only those for whom coverage is either not affordable or does not provide at least minimum value. Additionally, the "B" penalty cannot be more than the "A" penalty would have been if it applied. The 2018 amount will be $3,480 ($290/month).

Example - 4980H Penalty Analysis

For 2017, assuming 3 employees received subsidized government health care from the Marketplace, if no coverage was offered to the employees, the annual “A” penalty would be $180,800 (110-30*$2,260). The annual “B” penalty would be $10,170 (3*$3,390). This employer should at least offer unaffordable coverage and avoid the “A” penalty. The employer would then be subject to the “B” penalty of $10,170.