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IMPACTS OF AFFORDABLE CARE ACT IMPLEMENTATION ON STATE HR DEPARTMENTS

KEY POINTS

Employee Benefits
The Affordable Care Act (ACA) has a myriad of requirements for managing State employee benefits. The legislation can be quite impactful in the form of significant penalties. This equates to a plethora of administrative tasks surrounding compliance with the legislation for State HR practitioners.

HIM Staffing Implications
Most States have made their decision whether or not to build their own Health Insurance Marketplace (HIM). Some HR leaders at States planning to implement their own HIM rather than relying on the Feds face a significant task of defining and filling jobs that will support the new HIM.

Reporting and Compliance
Even the IRS isn't yet certain about the full reporting burden that will eventually be imposed under the Affordable Care Act. The best prepared organizations will keep close tabs on emerging regulations, and develop a proactive strategy for monitoring current and pending proposed regulations.

EXECUTIVE SUMMARY/OPENING STATEMENT

Under direction of the NASPE Corporate Council, a workgroup comprised of both Corporate and State NASPE members was formed to create a high-level analysis of the issues surrounding implementation of the Patient Protection and Affordable Care Act in terms of their impact on State Human Resources offices.

The workgroup's efforts centered on distilling the vast amount of available information surrounding the ACA into the following three areas that should be of primary concern to State HR Directors.

1) Direct implications for State HR Departments in managing employee benefits,
2) Staffing efforts required for implementation of Health Insurance Marketplaces, and
3) Explicit and implied changes to reporting requirements to ensure compliance.

Several excellent presentations regarding the impact of the ACA have been (and continue to be) delivered at various government-friendly conferences across the US. This includes

- **Up to the Minute: Understand Your Responsibilities under Health-Care Reform**, by Buck Consulting at the GFOA annual conference in June, 2013 (A copy of the presentation can be found at http://www.eventscribe.com/2013/GFOA/assets/pdf/69470.pdf),
- **The Affordable Care Act**, by Liliana Salazar of Wells Fargo Insurance at the Western Region IPMA conference May 2, 2013 (Presentation at: http://wripma.shutterfly.com/), and
- **Healthcare Reform in 2014: What You Need to Know**, by Kaye Pestaina of Mercer via an IPMA-HR Professional Development webinar on April 30, 2013 (Presentation at https://cc.readytalk.com/cc/download/schedule/cnkmz9t803x1). Subscriptions or user authorizations may be required to retrieve presentations.

It should be noted that this paper is not an exhaustive exploration of the legal and operational implications inherent in the ACA. It is merely high-level guidance on what were identified as some of the more critical impacts of the legislation. Each state is advised to consult with their own Attorney General and other internal resources for a thorough evaluation of its duties under the law.

ACA IMPACTS ON STATE HR DEPARTMENTS FOR MANAGING EMPLOYEE BENEFITS

Last year NASPE published a White Paper entitled "Challenges & Current Practices in State Employee Health Care" which highlighted the varied reactions by states to the ACA. In 2013, State government employers will see significant new changes for the health coverage they offer their employees. New pricing rules and new product design mandates (including those now delayed until 2015) will have a significant impact on the cost of care in 2014 and beyond. State employers may not feel the impact as significantly as the individual and small group market, but they will have new cost sharing and maximum out-of-pocket rules that will likely impact their rates.

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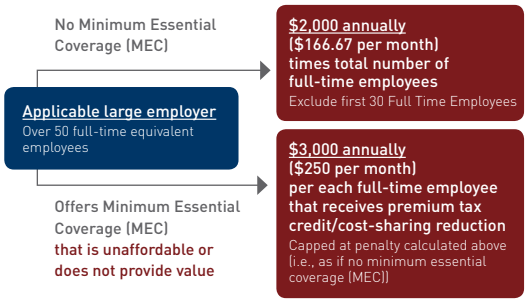
The ACA also includes a number of fees and taxes that will affect the cost of health care for employers. While the exact cost may differ for each state based on location and plan design offered, increases are a distinct possibility. Four of the key new fees include the Patient-Centered Outcomes Research Institute (PCORI) Fee, Insurer Fee, Transitional Reinsurance Fee and the Risk Adjustment Fee. The full impact on the cost of care from these fees and taxes are unknown as evidenced by the following competing studies (See footnote to competing studies). With regard to taxes, the best source is the IRS publication: http://www.irs.gov/uac/Affordable-Care-Act-Tax-Provisions.

State employers will also need to notify employees about the exchange and explain how their benefit package compares to exchange policies. According to a Segal Study from Spring 2013, the majority of state employees are enrolled in plans comparable to a "gold" plan on the exchanges. Granted, large groups cannot enter the exchange market until 2017, however some employees could find a more affordable plan through their state exchange. This could apply to certain low-income state employees who receive a low contribution from the state, and there could be an even greater impact to the retiree population. Depending on the generosity and affordability of a State's plan compared to available Marketplace offerings, retirees who have a lower income level may elect to switch.



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As we all know, some states have significantly unfunded liabilities for retiree health care and the so-called silver tsunami will make covering the post-employment health insurance requirement even more difficult. It has been suggested that the marketplaces may help reduce this burden. For limited income retirees, the HIMs may offer affordable alternative plans and allow states to access federal tax subsidies. The many unanswered questions, such as those around offered plan details and the cost of coverage on HIMs, may delay this initially. Some fear that if the HIMs are flooded with older and sicker retirees and don't attract the younger healthier population, they may become less affordable. Finally, the Children's Health Insurance Program (CHIP) enrollment for children of state workers is allowed for the first time under the ACA. Some states are helping low-income employees sign up.

On July 2nd 2013, the White House announced that it would delay the ACA's employer mandate until 2015. Along with all other employers of over 50 persons, this announcement gives States what some would argue is a much-needed reprieve. Still, unless the delay eventually leads to repeal of that portion of the act (as some pundits suggest), the employer mandate for full-time employees beginning in 2014 is going to impact state governments. With 30 hours/week (130 hours/month) now considered as full-time, states have been grappling with how avoid incurring penalties for seasonal workers who may be

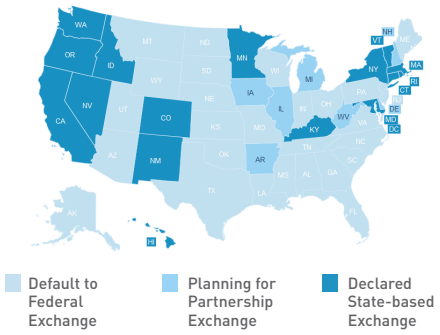
eligible. Depending on the circumstances, employers can be subject to a penalty of $2,000 or $3,000 per full-time worker (see chart at left). While a safe harbor rule exists (e.g., States who offer compliant coverage to at least 95 percent of their eligible employees are exempted from penalties), for these part-time and seasonal employees states must decide who will be offered health benefits and who can be directed to the exchange. A state can strategically define its measurement period to control which seasonal employees are eligible for coverage – using metrics to ensure compliance will be critical here (see the Reporting and Compliance section below). Beyond that, will employers intentionally limit work hours to avoid coverage? Other remaining questions: Will spouses of this group be covered? What will the IRS rule with regard to whether States are single employers (encompassing all legislative, judicial, higher education, etc. groups)?

> "...States are grappling with how avoid incurring penalties for seasonal workers who may be eligible [for health insurance benefits under ACA]."

Another area of concern surrounds calculating eligibility for re-hires. Along with a great deal of other useful information, the January 4th Legislative Alert from Wells Fargo Insurance provides this guidance around termination of employment and resumption of service rules (paraphrased for brevity): "Employees rehired after termination of employment will be treated as new employees if the employee incurs a period of at least 26 consecutive weeks for which no hours of service are credited, or if the period with no credited hours is at least four weeks long and is greater than the employee's period of employment immediately preceding the period with no credited hours of service." (Legislative Alert, IRS and Treasury Department issue proposed regulations on health care pay or play mandate, Wells Fargo Insurance; January 4, 2013). It is important to note that these rules may shift, and it is best to have your attorney evaluate them prior to acting.

Finally, the 2013 NASPE White paper ranked "disease and chronic care management" and "wellness and prevention" as the top two employee health care priorities. New guidance addresses the implementation of wellness incentive programs (which fall under HIPAA's wellness incentives) to ensure the programs are made available to all similarly situated individuals. The Notice of Proposed Rulemaking (NPRM) provides proposed rules on the extension of existing nondiscriminatory protections, and the size of the reward, as it relates to total cost of coverage. As with other provisions of the ACA, state employers may not feel as great an immediate impact as the individual and small group market will. In any case, these provisions will influence the shape and direction of all wellness and disease management programs.

STAFFING IMPLICATIONS OF VARIOUS HEALTH INSURANCE MARKETPLACE MODELS



State Decisions on Health Insurance Exchanges and the Medicaid Expansion, as of June 14, 2013

Source for picture: http://kff.org/health-reform/state-indicator/state-decisions-for-creating-health-insurance-exchanges-and-expanding-medicaid/#map

The Federal government is pouring billions of dollars of aid into the States to help with ACA implementation, with the lion's share of the grant funds earmarked to pay for first year implementation costs. A proportion of those initial costs will be absorbed by IT initiatives, but the costs of staffing around Health Insurance Marketplaces (HIM), whether State run, State-Federal partnerships, or federally managed should not be underestimated. Due to strong guidance within the legislation, Marketplaces will be heavily automated and geared towards self-service. As programs mature, staffing costs should taper off to a manageable status quo.

The 17 states that have declared a state-based exchange as of this writing are banking on being able to assimilate their share of that grant money into their economies. Those who have additionally elected to implement Medicaid expansion may be able to leverage their existing Medicaid eligibility assessment resources for HIM to some extent. Pre-existing organizational structure, job descriptions, and trained staff should help drive costs down.

Regardless, spinning up a State-run Marketplace will require a mammoth effort on the part of State HR offices. Creating an organization and developing comprehensive job descriptions are the first steps towards staffing the Marketplace, but the bulk of the workload comes with recruiting, training, and maintaining the new workforce. According to the Henry J. Kaiser Family Foundation, Marketplaces must among other things "...allow consumers to apply for and enroll in coverage online, in person, by phone, fax, or mail and provide culturally and linguistically appropriate assistance. To do this, states must provide access to telephone call centers, build a website with information about insurance options and application assistance, and create a Navigator program to improve public awareness and facilitate enrollment. The IT system must seamlessly determine eligibility for public programs, such as Medicaid or the Children's Health Insurance Program (CHIP), and determine premium tax credits and cost-sharing subsidies for those purchasing insurance through the marketplace." (http://kff.org/health-reform/issue-brief/establishing-health-insurance-exchanges-an-overview-of/). Existing Medicaid resources notwithstanding, these requirements represent increased headcount in at least three main areas: change management resources, technical personnel to implement and manage systems, and call center staff to assist applicants with eligibility questions as well as process and self-service issues.

> "...spinning up a State-run Marketplace will require a mammoth effort on the part of State HR offices."

For State employees in general, and especially for Medicaid eligibility staff, ACA provisions present significant differences in what benefits options are available and how they are managed. For this reason it is important to set aside funding for change management efforts, whether internally staffed or outsourced.

Arguably the biggest challenge will be the recruitment of system implementation and management personnel, as well as call center staff who can '...provide culturally and linguistically appropriate assistance ...' and help every day citizens untangle the premiums, tax credits, and cost-sharing subsidies that might apply in a given case. Competing in a dwindling talent market at State wage levels is tricky enough — and these kinds of skills don't grow on trees, as they say, in any employment market. Since many State governments are located in smaller cities, these positions will be even harder to fill. Innovative employment policies and recruitment strategies will be a necessary ingredient for success. For example, organizations may look towards developing facilities in their larger markets, and creating more open policies around work location flexibility and/or telecommuting. Accommodating flexible hours may be another way to lure the right candidates in. And finally, another potentially viable strategy is training: agencies may elect to 'skill-up' elements of their existing workforce, or consider bringing in candidates with partial skillsets and training to fill the gaps.

> "Arguably the biggest challenge will be the recruitment of system implementation and management personnel, as well as call center staff . . . Innovative employment policies and recruitment strategies will be a necessary ingredient for success."

Only seven states have currently elected to enter into a State-Federal partnership Marketplace. Still, this model deserves a brief mention here as they will still be impacted by staffing requirements as applicable. States electing this model "...may administer plan management functions, in-person consumer assistance functions, or both, and HHS will perform the remaining Marketplace functions." (http://kff.org/health-reform/state-indicator/health-insurance-exchanges/). Clearly, they will need to deal with some of the issues mentioned above depending on the details of their chosen approach. They will also need to set up a Navigator program to support outreach and education.

Finally, the bulk of States have elected to default into the federally-facilitated Marketplace (27 at this writing). These States have chosen to mitigate the risks around ACA implementation by leveraging Federal resources. However, the best-managed of these will still invest in change management

resources to ensure the smoothest possible transition for their own employees. Further, "States' involvement with the federal marketplace, while not mandatory, will be important for ensuring effective and seamless operation." (http://kff.org/health-reform/issue-brief/establishing-health-insurance-exchanges-an-overview-of/). The degree to which each State intends to support the success of the ACA may be apparent in the level of organizational support it plans for and provides to the federal Marketplace.

STATES MAY WISH TO CONSIDER INCLUDING THEIR OWN HEALTH INSURANCE OFFERING ON THE HIM

A core goal of the ACA is that health insurance exchanges will be marketplaces that offer affordable high-quality health insurance options. Exchanges will create lower costs by increasing competition among private insurance plans, provide one-stop shopping to eligible consumers and with tools to compare benefits, pricing and quality, and offer greater benefits and protections by creating a marketplace that will allow employers and consumers to choose from high quality benefits plans.

The benefits included by States with self-insured health-insurance offerings are typically very robust in comparison with traditional commercial plans. In these cases, it is possible that offering the State's plan in the Marketplace may offer another way to fund the ongoing costs of the ACA and State HR in general.

ACA RELATED CHANGES TO EMPLOYER REPORTING AND COMPLIANCE OBLIGATIONS

The NASPE team's research on ACA implementation turned up the following statutory and implied areas surrounding reporting and compliance obligations with which State HR Executives may be concerned. We have lumped compliance and reporting together, as the ability to track and measure compliance will be dependent on an organization's ability to stay abreast of internal workforce metrics via complex analytical reporting.

> "...it is critical for state governments to carefully document the reasons for any adverse employment decision which affects an employee who may be engaged in activity the ACA views as protected."

POSSIBLE W-2 CHANGES TO TRACK ACA/EMPLOYEE HEALTH INSURANCE PARTICIPATION

Effective for the calendar year 2012 (issued in early 2013), Federal W2's for state employees who qualify for healthcare coverage under the ACA must reflect the value of employer sponsored health coverage. The value of the coverage will be shown in W2 form Box 12 with code DD. The IRS has been emphatic that the new values required to be reported are not taxable and that the sole purpose of the change is to make employees aware of the total cost of their employer sponsored plans. Many employees pay a payroll deduction for some of the cost of their health plans and amounts to be reported include both the employer and employee amounts. More information can be found at ACA - IRS guide for employers - reporting group health insurance costs or http://www.irs.gov/pub/irs-drop/n-11-28.pdf.

The following IRS site regarding ACA Tax Provisions may also prove helpful: http://www.irs.gov/uac/Affordable-Care-Act-Tax-Provisions

BE PREPARED TO JUSTIFY THAT ADVERSE ACTIONS AREN'T RELATED TO ACA ELIGIBILITY

Section 1558 of the ACA amends the Fair Labor Standards Act (FLSA) to prohibit employers from retaliating against any employee for engaging in any activity that is protected by the ACA. A new retaliation claim has been created for employees to file with the Department of Labor, and in federal court, against their employer. Because of the relatively short timeframes associated with these claims, it is critical for state governments to carefully document the reasons for any adverse employment decision which affects an employee who may be engaged in activity the ACA views as protected. Equally critical is the ability to lay hands on that documentation quickly in the face of a claim; this suggests that said documentation should be closely associated with the employment system of record for quick retrieval.

As with any complex piece of legislation, the devil is in the details of the amendment and a careful review by your legal team is strongly advised. For more information on Section 1558 visit: http://www.whistleblowers.gov/acts/aca.html.

EMPLOYERS BEAR THE BURDEN OF PROOF

Section 1558's employee-friendly burden of proof dictates that the employee must prove by a preponderance of the evidence that his or her participation in a protected activity was a contributing factor in the action taken against him or her by the employer. The burden then shifts to the employer to prove by clear and convincing evidence – a much more difficult burden of proof - that the employer would have taken the same action against the employee if the employee had not engaged in the protected conduct.

This provision is indicative of a broader theme in the legislation: that in order to avoid penalties and other repercussions associated with Health Care Reform, employers must initiate and maintain deep documentation and be able to provide complex analytics as proof of compliance in the event of an employee claim or federal inquiry.

"...in order to avoid penalties and other repercussions associated with Health Care Reform, employers must initiate and maintain deep documentation and be able to provide complex analytics."

For example, the law includes provisions that plans must be affordable and provide 60% actuarial value, or meet one of three safe harbor options. Affordability is a function of employee earnings, and requires that plan premiums be measured against income. If the variability of wages from one position to the next doesn't complicate these calculations enough, every potential change of an employee from part- to full-time will require an affordability check, and system-wide pay decreases which have been common in recent years would be very likely to carry an accompanying premium reduction to ensure compliance. It stands to reason that States must keep appropriate records of the results of these calculations.

Further, "Plan Affordability" requires an analysis of the actuarial value of the plan, because actuarial value is a measure of the plan's generosity. Minimum Value, on the other hand, is the minimum actuarial value that all plans must provide: 60 percent. To determine actuarial value or minimum value, plans can either use calculators or design-based safe harbor checklists provided by the federal government.

REPORTING/ANALYTICS REGARDING WORKFORCE ELIGIBILITY METRICS

The ACA is driving a number of mandates, but a basic premise of the legislation is that employers must offer "affordable" health coverage (as mentioned above) to all employees working an average of 30+ hours per week in a month. Failure to comply could result in fines of $2,000 or even $3,000 per employee per incident as outlined earlier in this brief. Insight into worker groups hovering in and around the 30-hour work week will likely drive a need for reporting and analysis, some salient examples of which include:

- **Look Back:** States will need timekeeping, analytical and ad-hoc reporting tools to look back and analyze worker groups to see who should have been full-time based on the new rules of 30+ hours average/week in a month.

- **Look Back/Stability/Monitoring:** Timekeeping data should be analyzed across measurement periods to determine whether employees' statuses should be changed from part-time to full-time (or vice-versa) within the HR system of record. This should also trigger the initiation of the benefits eligibility process and enrollment via whatever manual or automated methods the State may have in place. Automated solutions are advised as they facilitate reporting real-time reporting, which will be critical to maintaining compliance.

- **Monitoring/Scheduling/Analytics:** States may choose to proactively evaluate workforce schedules on an ongoing basis in order to prevent employees who are intended to be part-time from inadvertently crossing the 30+ threshold. Again, States who aren't doing so already will want to consider the use of consolidated

scheduling tools in conjunction with workforce analytics and timekeeping to examine where employees who are in the measurement period will fall based on forward-looking schedules.

THE BOTTOM LINE: STAY INFORMED

The Internal Revenue Service (IRS) has published several Notices of Proposed Rulemaking, including the one entitled "Shared Responsibility for Employers Regarding Health Coverage" on January 2, 2013 (http://www.irs.gov/pub/newsroom/reg-138006-12.pdf). It is important to note the 'proposed' nature of these notices; all are subject to public hearing and further amendment prior to codification. Shared Responsibility applies to large employers like state governments with an average of at least 50 full-time employees, taking into account full-time equivalent employees (FTEs) employed during the preceding calendar year.

Details of the proposed regulations are beyond the scope of this brief, but are provided here as a reference and to highlight the fact that regulations and compliance reporting requirements continue to shift as IRS and the federal government in general adapt their operations to accommodate the letter and intent of the Affordable Care Act. Sources of information provided in this brief are an excellent place for State HR Executives to keep up-to-date with ongoing changes, and in addition, State governments should monitor IRS publications and other federal guidance in order to ensure ongoing compliance.

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