Implementation Considerations for Businesses Under the Patient Protection and Affordable Care Act

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Agenda

- The basic coverage requirement of the law
- The operation and role of Exchanges
- Considerations for employers
- Financing the law: the medical device tax and other revenue measures
- The role of the Medicare program

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Basic Coverage Requirement of the Law

- Every individual lawfully present in the United States must have "minimum essential" health care coverage or pay a penalty to the federal government.
  - Exception for religious conscience and prisoners
  - Exception for low income individuals; short gaps in coverage; members of Indian tribes.

- It was this provision of the law that was upheld by the Supreme Court last summer. *NFIB v. Sebelius*.

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Basic Coverage Requirement of the Law

- "Minimum essential coverage" means:
  - Government programs (Medicare, Medicaid, SCHIP, TRICARE, VA);
  - Employer-sponsored coverage;
  - Health plans sold in the individual marketplace;
  - A grandfathered health plan;
  - Other coverage deemed acceptable by HHS

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Basic Coverage Requirement of the Law

- The sponsors of the law envisioned a three-prong pathway to universal health care coverage:
  - For very low income, Medicaid
    - Medicaid is expanded to cover all individuals with income under 133% FPL.
  - For individuals with income between 100% - 400% of poverty who do not otherwise have affordable coverage, subsidized coverage through an Exchange;
  - For everyone else, employer-based coverage or Medicare/TRICARE/VA

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The Operation and Role of Exchanges

- Each state must establish an “affordable health care exchange” by 1/1/2014 through which individuals can purchase subsidized insurance.
  - If states do not establish an Exchange, the federal government will operate the Exchange.
  - Only about 15 states are likely to be able to operate Exchanges.

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The Operation and Role of Exchanges

- Thoughts on Exchanges
  - What is an Exchange?
  - What types of health plans will be offered on Exchanges?
  - How do the subsidies work?
  - What types of business opportunities exist to partner with Exchanges?

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The Operation and Role of Exchanges

- What is an Exchange?
  - A marketplace (likely an on-line marketplace) operated by a state where consumers can purchase a subsidized health insurance plan.
  - Model like Expedia; Hotels.com; etc.: an aggregator of information.
  - The crucial question of the moment: can Exchanges really be up and running by the time open enrollment will start (likely 10/2013)?

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The Operation and Role of Exchanges

- What types of health plans will be offered on Exchanges?
  - Under the statute, only a “qualified health plan” can be offered on an Exchange.
  - QHPs must offer “essential health benefits”
    - HHS must define this term in regulations (not yet finalized)
    - Includes hospitalization; physician services; prescription drugs; emergency care; mental health and substance abuse and five other benefits.

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The Operation and Role of Exchanges

- How do the subsidies work?
  - Individuals with income between 100% - 400% FPL qualify for subsidies, administered as refundable tax credits, to assist in the purchase of a QHP on an Exchange.
  - Although the law says that the subsidy is available only to purchase a plan sold on an Exchange "operated by the state", the IRS has interpreted this to include federally-operated Exchanges.

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The Operation and Role of Exchanges

- Business opportunities to partner with Exchanges
  - Web-based entities can assume many (but not all) Exchange functions, per HHS Exchange regulations.
  - Information aggregators: technology solutions that can consolidate multiple data points into a simplified format.
  - Agents and brokers.
  - Health plan benefit design.
  - Other?

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Considerations for Employers

- Employers have new requirements and must make some important decisions under the new law
  - Information to employees
  - Automatic enrollment into health plans
  - Coverage requirements

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Considerations for Employers

- Employers must make more information available to employees under the law:
  - New W-2 reporting requirements: employers must report the value of employer-provided health insurance to employees.
  - Employers must make information available to employees regarding the role of Exchanges.

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Considerations for Employers

- Additional Information to Employees
  - With respect to plan years that start on or after 9/23/2012, employers must make a summary of benefits and coverage (SBC) available to employees.
  - SBC is different, and in addition to, the SPD that ERISA requires.
  - It is a four-page (front and back) document that is designed to provide simplified information about employer health coverage.

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Considerations for Employers

- Automatic Enrollment in Health Plans
  - Employers subject to the FLSA with more than 200 employees must automatically enroll employees into one of their health benefit plans.
  - Employer must also provide the employee with adequate notice and opportunity to opt out of any coverage in which the employee was automatically enrolled
  - IRS notice stated that employers need not comply with this provision until the Department of Labor issues regulations
    - Regulations are expected to be completed in 2014

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Considerations for Employers

- PPACA adds a new § 4980H to the Internal Revenue Code – the "employer responsibility requirement."

- There are two potential ways that an employer can face liability under the employer responsibility requirement.
  - § 4980H(a) liability: for employers that do not offer health care coverage to their employees
  - § 4980H(b) liability: for employers that do offer health care coverage, but that coverage is not "affordable" or does not offer "minimum value"
    - Affordable = 9.5% of the employee's "household income"
    - "Minimum value" = 60% of the costs of coverage

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Considerations for Employers

- Shared responsibility penalty
  - Neither penalty is triggered unless an employee purchases coverage on an Exchange and claims the tax credit subsidy.
    - § 4980H(a) liability is equal to $2,000 times the number of full-time employees of the employer
    - § 4980H(b) liability is equal to $3,000 times the number of full time employees who purchase a plan on the Exchange
  - Penalty only applies to large employers (50 or more full-time employees).
  - IRS proposed regulations published December 28 (comments through March 18) describe these rules in greater detail.

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Financing PPACA

- The law contains a number of tax increases designed to finance the law:
  - High-cost insurance plans and excise tax on all health insurance
  - Sales of branded pharmaceutical products
  - Increase in Medicare payroll tax for high-income individuals
  - Medical device tax

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Financing PPACA

- Medical device tax
  - 2.3% of the sales price of a medical device
    - Thus, the tax applies regardless of the income of the manufacturer
  - Exemptions from the device tax
    - Tax applies only on devices “intended for humans”
      - Thus, devices for veterinary purposes are excluded
    - Eyeglasses
    - Contact lenses
    - Hearing aids
    - Retail exemption

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Financing PPACA

- Medical device tax – the retail exemption
  - IRS regulations published on December 7 flesh out the retail exemption in considerably more detail
  - Statutory test: a device "determined by the Secretary to be of a type which is generally purchased by the general public at retail for individual use."

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Financing PPACA

- Medical device tax – the retail exemption
  - The regulations establish a safe harbor and then a two-prong facts and circumstances test to determine whether a device qualifies for the retail exemption:
    - Is the device of a type which is customarily purchased by retail consumers in a retail setting (store, mail order, Internet) with minimal training by a physician?
    - Is the device of a type which is normally implanted or inserted or for use in a medical institution or setting?

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Traditional Medicare

- The traditional Medicare program generally continues with modest changes as a result of the law:
  - Significant reductions in funding for Medicare Advantage plans
  - Delivery system reform: accountable care organizations; bundled payment systems

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Traditional Medicare

- Significant changes coming to traditional Medicare in 2013
  - Competitive bidding for durable medical equipment;
  - Significant liberalization of the long-term care benefit (*Jimmo v. Sebelius* settlement);
  - Medicare Advantage and Part D plan design in 2014;
  - Dialysis bundled payment system

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Conclusion

- Health care reform law on track to be implemented in 2014.
- Major implementation challenges for states and federal government, businesses and employers.
- The traditional Medicare program will see major developments in 2013.

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Thank You

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