Implications for Colleges for Concealed Carry Law - Continuing Challenges in ACA Compliance: What's Here...What's Coming...What's Delayed?!
I. BACKGROUND AND PURPOSE OF THE LAW

The Illinois Firearm Concealed Carry Act, 430 ILCS 66/1 et seq, (the “Act”) became law on July 9, 2013 after the Governor’s amendatory veto.

The Act became effective immediately, but the Illinois Department of State Police was given six months to make concealed carry applications available and to implement administrative rules.

The Act allows qualified and licensed individuals to carry concealed handguns outside of an individual’s home, with limited exceptions. A concealed carry license is valid for five years.

Handguns not long guns are permitted for concealed carry. Explicitly excluded are stun guns, tasers, machine guns, short barrel rifles/shotguns, pneumatic guns, spring guns, paintball guns and BB guns.

II. QUALIFICATIONS TO OBTAIN A CONCEALED CARRY LICENSE

- Applicant must be at least 21 years of age;

- Applicant must have a currently valid Firearm Owner’s Identification Card and at the time of application must meet requirements for the issuance of a Firearm Owner’s Identification Card and must not be prohibited under the Firearm Owners Identification Card Act or federal law from possessing or receiving a firearm;

- Applicant must not have been convicted or found guilty in Illinois or any other state of: (a) a misdemeanor involving the use or threat of physical force or violence to any person within the five years preceding the date of the license application; or (b) have two or more violations related to driving while under the influence of alcohol, other drug or drugs, intoxicating compound or compounds, or any combination thereof, within the five years preceding the date of the license application;

- Applicant must not be the subject of a pending arrest warrant, prosecution, or proceeding for an offense or action that could lead to disqualification to own or possess a firearm;
Applicant must not have been in residential or court-ordered treatment for alcoholism, alcohol detoxification, or drug treatment within the five years immediately preceding the date of the license application;

The Applicant must have completed firearms training and any education component required under Section 75 of the Act; and

The Applicant must not pose a danger to himself, herself, or others, or a threat to public safety as determined by the Concealed Carry Licensing Review Board in accordance with Section 20 of the Act.

III. PLACES WHERE CONCEALED CARRY FIREARMS ARE NOT PERMITTED

- Public and private schools;
- Child care facilities (but nothing prevents the operator of a child care facility in a family home from owning or possessing a firearm in the home if no child under child care at the home is present in the home or the firearm in the home is stored in a locked container when a child under child care at the home is present in the home);
- Courts and government buildings;
- Correctional facilities;
- Hospitals, hospital affiliates, mental health facilities and nursing home facilities;
- Mass transit;
- Bars (if more than 50% of the establishment's gross receipts within the prior three months is from the sale of alcohol);
- Public gatherings or special events requiring permits on property open to the public;
- Public parks and playgrounds and public athletic facilities;
- Cook County Forest Preserve District property;
- Gambling/gaming venues;
- Stadiums;
- Airports;
 Libraries;

 Amusement parks;

 Zoos and museums;

 Nuclear facilities;

 Places prohibited by federal law;

 Private property where the owner has chosen to ban firearms; and

 College and University property; specifically the law provides that a firearm may not be carried into:

 “Any building, classroom, laboratory, medical clinic, hospital, artistic venue, athletic venue, entertainment venue, officially recognized university related-organization property, whether owned or lease, any real property, including parking areas, sidewalks, and common areas under the control of a public or private community college, college, or university.”

 430 ILCS 66/65(a)(15).

 IV. PARKING LOT AREAS MAY ALLOW FOR LIMITED CONCEALED CARRY

 Even for areas where concealed carry is prohibited, persons shall still be permitted to carry a concealed firearm on or about his or her person within a vehicle into the parking area of a prohibited place.

 A person licensed to carry a concealed firearm must store a firearm or ammunition concealed in a case within a locked vehicle or locked container out of plain view within the vehicle in the parking area. For purposes of this subsection, "case" includes a glove compartment or console that completely encloses the concealed firearm or ammunition, the trunk of the vehicle, or a firearm carrying box, shipping box, or other container.

 A licensee may exit a vehicle and carry a concealed firearm in the immediate area surrounding his or her vehicle within a prohibited parking lot area only for the limited purpose of storing or retrieving a firearm within the vehicle's trunk, provided the licensee ensures the concealed firearm is unloaded prior to exiting the vehicle.
V. SPECIFIC CONCERNS FOR COLLEGES AND UNIVERSITIES

1. The Act specifically provides that colleges and universities are places where people cannot carry concealed weapons:

“A licensee under this Act shall not knowingly carry a firearm on or into...any building, classroom, laboratory, medical clinic, hospital, artistic venue, athletic venue, entertainment venue, officially recognized university related-organization property, whether owned or leased, any real property, including parking areas, sidewalks, and common areas under the control of a public or private community college, college, or university.” 430 ILCS 66/65(a)(15).

2. The Act further specifically provides that the Act should not be construed to prohibit community colleges and universities from:

- prohibiting persons from carrying a firearm within a vehicle owned, leased, or controlled by the college or university;
- developing resolutions, regulations, or policies regarding student, employee, or visitor misconduct and discipline, including suspension and expulsion;
- developing resolutions, regulations, or policies regarding the storage or maintenance of firearms, which must include designated areas where persons can park vehicles that carry firearms; and
- permitting the carrying or use of firearms for the purpose of instruction and curriculum of officially recognized programs, including but not limited to military science and law enforcement training programs, or in any designated area used for hunting purposes or target shooting.

430 ILCS 66/65(a-5).

3. Community colleges are specifically NOT exempt for the parking lot safe harbor provisions above. In other words, community colleges cannot outright ban people from bringing firearms onto campus if the firearms are stored in a vehicle in accordance with the Act. That being said, colleges are specifically permitted to regulate where parking can occur for vehicles that carry firearms.

4. The Act allows a person to carry a concealed firearm along a public right of way that touches or crosses community college property. 430 ILCS 66/65(c).

5. Concealed Carry Signage. Community colleges and universities must clearly and conspicuously post signs of uniform design, as determined by the Illinois
Department of State Police, at entrances stating that the carrying of concealed firearms is prohibited. The Act provides that the sign must be 4x6 inches in size. The Department of State Police may also promulgate other rules and regulations concerning posting of signs.

6. Clear and Present Danger Reporting. The chief administrative officer of a community college or university or his/her designee is required to report to the Illinois Department of State Police when a student is determined to pose a “clear and present danger” to himself, herself, or to others, within 24 hours of the determination and in accordance with Section 6-103.3 of the Mental Health and Developmental Disabilities Code, 405 ILCS 5/6-103.3. The term “clear and present danger” is defined as “a person who demonstrates threatening physical or verbal behavior, such as violent, suicidal, or assaultive threats, actions, or other behavior as determined by a physician, clinical psychologist, qualified examiner, school administrator, or law enforcement official.”

VI. COMMUNITY COLLEGES SHOULD ADOPT CONCEALED CARRY POLICIES

1. The Act specifically provides that colleges and universities may develop policies and regulations concerning student, employee and visitor misconduct and discipline, storage and maintenance of firearms, the parking of vehicles carrying firearms and concerning the handling of firearms where those firearms are permitted in campus because they are used in an approved class or used for permitted hunting or target shooting.

2. Policies should include or address the following:

   - Provisions concerning parking for vehicles carrying firearms (it is probably better to affirmatively say where and when such vehicles CANNOT park instead of designating a parking lot as firearm parking). For example, a parking lot where vehicles carrying firearms are normally permitted might be temporarily closed for firearm parking if tailgating for a music or athletic event is taking place.

   - Where classes such as military science or law enforcement training are taught on campus and use firearms, a policy should describe procedures for carrying the firearms onto campus.

   - Describe the possible discipline to which students, employees and visitors will be subject if they are found to be in violation of the Act or in violation of college policies concerning concealed carry.
The policy should designate the person that will be responsible for determining when a student poses a “clear and present danger” to himself, herself, or to others, and for reporting this determination to the Department of State Police.

The policy may want to have provisions designating the person or department in charge of posting the required signage that carrying concealed weapons is prohibited.

In preparing a policy, a college should consider whether it wants to offer the option for persons to store weapons at the college police department or at some other location.

VII. NEXT STEPS FOR COLLEGES TO TAKE

- Consult with appropriate administrators and legal counsel about developing a policy consistent with the Act.

- Educate your police departments and public safety departments about enforcement of the Act and enforcement of relevant college policies. Consider law enforcement continuing education classes addressing how to handle the new presence of concealed weapons on campus. For example, law enforcement policy makers will likely need to make a policy decision about whether all persons stopped in their vehicles will be asked if they are carrying a concealed weapon and required to show a concealed carry license.

- Educate students and employees about the Act, college policies concerning concealed carry, college expectations and consequences of violating the Act and college policies.

- Monitor the Illinois Department of State Police website for information concerning the administrative rules that will be promulgated to implement the Act. In particular, monitor the website for more information about the design of the signs to be posted at the entrances of places where firearms are prohibited.

- Once the Illinois Department of State Police creates signage, colleges will need to obtain signs and determine posting locations and determine which college department will be responsible for posting and maintaining the signs.
The Affordable Care Act (“ACA”) legislation was designed to make significant changes in the country’s health care system and the health insurance industry. Since its enactment in 2010, numerous ACA requirements have become effective that significantly affect the design and cost of employer provided health plans, and have added significant administrative burden for employer plans. Moreover, additional provisions that will become effective in 2014 will have critical impact on employers’ decisions and costs related to providing health coverage to their employees. Accordingly, it is essential for all employers to fully understand the current and upcoming ACA requirements in order to proactively address compliance issues.

I. RECAP OF ACA PROVISIONS IMPLEMENTED SINCE 2010 THAT SIGNIFICANTLY AFFECT EMPLOYER HEALTH PLANS AND OBLIGATIONS

Since its enactment in 2010, numerous provisions of the ACA have become effective that significantly impact employers’ health plans. This provides a brief recap of some of those changes that directly affect employers’ health plans and obligations under the ACA.

A. New Coverage Rules for Adult Children
   1. Any group health plan providing coverage for dependent children must make such coverage available until a child turns age 26. Eligibility is based only upon the relationship between child and participant. Coverage cannot be restricted based on other factors such as financial dependency, student status, marital status, employment, etc. Effective first plan year after 9/23/10.
   2. Internal Revenue Code amended so that health benefits provided to employee’s adult child are not taxable income to the employee. Effective 3/30/10.

B. New Internal Claims Appeals and External Review Processes
   1. Health plans must implement specific claims and appeal procedures and external review processes, including expanded adverse determination definitions, expedited notice requirements, additional review criteria, and requirements to continue coverage pending appeal outcome, among other requirements. Effective first plan year on or after 9/23/10.

C. Rule Change for Reimbursement of Over-the-Counter Drugs
   1. Payment or reimbursement for medications or drugs limited to prescription drugs, over-the-counter drugs obtained with a prescription, and insulin. Also applies to HSAs, FSAs and HRAs. Effective for purchases made after 12/31/10.
D. **Annual W-2 Reporting on Value of Employer Provided Health Benefits**

1. Employers issuing at least 250 W-2 forms annually must report on employees’ W-2 Forms the “aggregate cost of employer sponsored health coverage” for each employee. Effective beginning with W-2 Forms issued for 2012 tax year.

E. **Uniform Summary of Benefits and Coverage (SBC) Notification**

1. All group health plan sponsors must provide a Summary of Benefits and Coverage to all plan participants, eligible employees and their eligible dependents when employee first becomes eligible, and during any special or open enrollment period thereafter. SBC has extensive mandatory content and format requirements. Effective 3/23/12.

2. **Note:** The SBC to be provided during open enrollment for the 2014 plan year and thereafter requires two additional Q&As: (1) Does this coverage provide Minimum Essential Coverage, and (2) Does the coverage meet the Minimum Value standard.

F. **Statutory Cap of $2,500 on Health FSA Contributions**

Statutory cap of $2,500 imposed on employees' pre-tax contributions to FSAs offered under cafeteria plans, to be increased annually by cost of living adjustment. Effective 1/1/13.

G. **Additional Plan Reforms Applicable to All Group Health Plans**

Numerous additional plan reforms already implemented affect access to coverage under an employer's health plan and impact the types of plans available and the cost of providing coverage including:

1. **Prohibition on lifetime limits on the dollar value of health benefits.** Effective first plan year after 9/23/10.


3. **Pre-existing condition exclusions are eliminated for individuals under age 19.** Effective first plan year after 9/23/10.

4. **Prohibits rescission of health coverage except in case of fraud by plan participant.** Effective first plan year after 9/23/10.
II. ADDITIONAL ACA PROVISIONS ENACTED IN 2010, BUT ON HOLD PENDING REGULATIONS

A. Automatic Enrollment for Large Employers

1. Employers with more than 200 employees required to automatically enroll all new employees in the employer’s lowest cost group health insurance plan, unless the new employee opts out of the coverage.

2. Enacted in 2010, but enforcement stayed pending issuance of additional regulations.

B. Nondiscrimination Rules for Fully Insured Group Health Plans

1. Fully insured group plans may not discriminate in favor of highly compensated employees as to eligibility or benefits provided under the plan. Previously only self-insured plans were subject to nondiscrimination rules for highly compensated employees. Highly compensated employees are the highest paid 25% of all employees, with some exceptions.

2. Penalties for violation may be significant at $100 per day per person discriminated against - up to $500,000 or 10% of the amount the employer paid or incurred for the health plan during the preceding tax year, whichever is less.

3. Note: Nondiscrimination rules were already in effect for self-insured health plans under the IRS Code, with penalties for discrimination resulting in additional taxable income for the favored employees, and no penalties levied on the employer.

4. Initially effective first plan year after 9/23/10, but enforcement stayed pending issuance of additional regulations.

III. WHAT’S NEXT THAT WILL IMPACT EMPLOYEES AND EMPLOYER HEALTH PLANS

A. The Individual Mandate

1. Beginning on January 1, 2104, nearly all U.S. residents will be required to maintain health insurance with “minimum essential coverage” for themselves and their dependents, or otherwise pay a penalty.¹

2. Individuals can obtain this minimum essential coverage through employer sponsored group health plans, plans available in the individual market, various government programs, or through a health insurance exchange (“Exchange”).

¹Certain exemptions are made including for hardship (case by case basis), income below federal tax filing threshold, religious conscious objectors, short coverage gaps, persons who are incarcerated or not lawfully present individuals.
3. Individuals will be assessed a penalty for every month that they, or their dependents, do not have qualified health insurance coverage. The penalty amount will be the greater of a specified flat dollar amount or a percent of income amount.

- The flat dollar annual penalty amount is $95 in 2014, $325 in 2015, and $695 thereafter for each individual, spouse and dependent, capped at three times the annual flat dollar amount.

- The percent of income penalty amount is the taxpayer’s household income minus the taxpayer’s exemptions and standard deductions, multiplied by a set percentage which is 1% for 2014, 2% for 2015, and 2.5% thereafter.

4. The penalty payment is reported on the individual’s federal income tax return, and collected in the same manner as income taxes.

5. Individuals who buy insurance through an Exchange, and who are not eligible for adequate and affordable coverage from an employer or government program, will be eligible for a tax credit or premium subsidy if they meet certain low income requirements.

- Generally, individuals with household income of between 100% and 400% of the Federal Poverty Level (“FPL”) will qualify for the subsidy. (For 2013, the FPL is about $46,000 for individuals and $94,000 for a family of four.)

6. Note the following premium subsidy rules of particular interest to employers when considering the impact of employer “Play or Pay” penalties, discussed below:

- Individuals eligible for an employer sponsored plan that is affordable and provides minimum value (as defined by the ACA) are not eligible for the premium tax subsidy for a purchase through the Exchange.

- If an employee enrolls in the employer’s health plan, even if that plan does not meet the affordability and minimum value standards, the employee will not be eligible for the premium tax subsidy for any purchase through an Exchange.

B. Health Insurance Exchanges (“Marketplaces”)

1. State or federally facilitated health insurance exchanges (sometimes referred to as “Marketplaces”) are required to open for enrollment on October 1, 2013 and offer health insurance coverage to be effective January 1, 2014.

2. States may establish their own exchange in compliance with ACA requirements, partner with the federal government to run an exchange, or
otherwise the federal government will set up an exchange within the state. Illinois has chosen to partner with the federal government.

3. Under the ACA, Exchanges are required to perform the following functions, among others:

- certify qualified health plans that will be available on the Exchange,
- assign relative quality and price ratings to each offered plan,
- provide standardized information on the available plans,
- operate a website and toll-free call center to provide information and allow eligible individuals to purchase and enroll in health coverage,
- determine eligibility for the Exchange, premium tax subsidies, and government health programs,
- determine when individuals are exempt from the individual mandate,
- establish a ‘Navigator’ program which awards grants to public or private entities to provide information and assist consumers with using the Exchange.

4. Exchanges are required to verify applicant information used to determine eligibility for coverage and whether the applicant is eligible for a premium tax subsidy. This requires access to applicants’ IRS tax filings, as well as information about the applicant’s employment status, and the employer’s health plans.

5. Verification of employer sponsored coverage is necessary to certify whether an individual applying for coverage on an Exchange is eligible for a premium tax subsidy, including whether the individual is enrolled in an employer’s health plan, or is eligible for employer health coverage that meets affordability and minimum value standards.

C. The Individual Mandate, Exchanges and their Effect on Employer Administrative Tasks

1. An Exchange is required to notify the employer when one of its employees is determined to be eligible for a premium tax subsidy based in part on a finding that the employer does not provide access to a qualified health plan that is affordable for the employee and meets minimum value standards.

2. The employer is entitled to appeal a decision that an employee is eligible for a tax subsidy based on a finding that the employer did not offer
qualifying coverage to the employee. Proposed regulations describe a detailed appeals process.

- The notice sent to the employer by the Exchange must indicate what information is deemed relevant to the employer appeal, which will include what coverage the employer offers, the cost of that coverage to the employee, and the employee’s compensation.

3. While an Exchange determination that an employee is eligible for a premium tax subsidy does not itself trigger an employer penalty, employers may wish to use the appeals process to ensure that their employees are not mistakenly or improperly receiving a subsidy that may trigger an employer penalty. (See below.)

4. Because of the new requirement that individuals have qualified health insurance or otherwise incur a financial penalty, employees are likely to have many questions for their employers about the health plans the employer is offering, and comparison with what is being offered on an Exchange.

5. Employers should anticipate additional questions from employees and prepare HR and other administrators to properly respond to questions and requests for information.

- Some of this information will be provided to employees through a required distribution of employer notices to all employees about health Exchanges and the employer’s health coverage options. (See detail below.)

- However, employers should be cautious to avoid miscommunications to individuals on these issues, and should avoid providing tax, coverage or other types of advice to employees about their health insurance choices.

6. Also, be aware that employers who discharge or discipline an employee shortly after being contacted by an Exchange with information that the employee is applying for a premium tax subsidy could be open to a charge of unlawful retaliation.

D. Employer Notice of Health Exchanges and Coverage Options

1. By October 1, 2013, employers are required to send all current employees a notice of “New Health Insurance Marketplace Coverage Options and Your Health Coverage”.

2. Notices must be sent to all employees, whether part-time or full-time, and regardless of whether they are eligible for employer health benefits. New employees must receive the notice within 14 days of hire.
3. The notice must advise employees of at least the following information:

• that they can obtain health coverage through a Health Insurance Exchange,
• certain information about the process to obtain such insurance and the availability of a tax subsidy for certain qualifying employees,
• where to get more information about the Exchange,
• contact information for an employer representative that can answer questions about the employer’s health plan, if any, and
• some basic information about the employer’s health plan for employer’s offering health coverage.

4. The U.S. Department of Labor (“DOL”) has provided two sample model notices that can be used to comply with this requirement - one for employers who do not offer a health plan, and one for employers who offer a health plan to some or all employees. Copies of the DOL sample notices which will need to be completed with the employer’s specific information, can be found at the end of this outline, and can be accessed at the following web addresses:


E. Additional New Fees for Health Insurers and Plan Sponsors

Health insurance issuers and plan sponsors will be required to pay additional fees to fund two new programs established by the ACA.

1. Patient Centered Outcomes Research Institute (“PCORI”) Fee

• The ACA established the PCORI, a non-profit corporation charged with supporting clinical effectiveness research which will be funded in part by fees paid by health insurers and sponsors of self-insured health plans.

• The fee will be payable each year for seven years. The fee for the first plan year ending on or after October 1, 2013 is $2.00 times the “average number of covered lives” under the policy or plan. The fee for future years will increase based on the Treasury Department’s projected increase in national health expenditures.

• For insured health plans, the policy issuer is responsible for paying the fee. For self-insured plans, the plan sponsor is liable for the fee. The fees are paid annually, and reported on IRS Form 720.
2. Reinsurance Payment Fee

• The ACA establishes a temporary "reinsurance program" to subsidize insurers in the individual market who now will be required to cover higher risk and higher cost individuals, which will be funded by health insurers and plan sponsors.

• The required fee payable in 2014 will be $63.00 per “covered life”, with the fee expected to decrease in the subsequent two years. The fees will be collected by the U.S. Department of Health and Human Services.

• For insured health plans, the fee will be paid by the insurance issuer. For self-insured plans, plan sponsors will be liable for the fee, which may be remitted by the plan’s third party administrator on behalf of the plan sponsors.

F. Additional Reforms for Group Health Plans as of January 1, 2014

1. All pre-existing condition exclusions are eliminated. (Pre-existing condition consideration was eliminated for individuals up to age 19 as of 9/23/10.)

2. Eligibility for health plans cannot be based on health status, medical condition, medical history, genetic information, disability or claims experience.

3. Annual and lifetime limits on essential health benefits are prohibited.

4. Eligible employees must be allowed to enroll in the employer’s health plan no later than 90 days after the date of hire.

5. Certain benefits must be provided to individuals who participate in clinical trials.

IV. EMPLOYER “PLAY OR PAY” PENALTIES - IMPLEMENTATION DATE DELAYED TO 2015

On July 2, 2013, it was announced that enforcement of the employer “Play or Pay” penalties would be delayed from January 1, 2014 to January 1, 2015. Despite this one year delay in enforcement, there are many issues that employers need to address now to prepare for the compliance with the employer mandate and potential employer penalties.

A. Employer Mandate

1. The employer Play or Pay penalties are intended to cause employers to comply with the ACA employer mandate to offer their full-time employees adequate and affordable health coverage as defined under the ACA, by assessing significant financial penalties on employers for non-compliance.
2. Beginning on January 1, 2015, delayed from the initial January 1, 2014 effective date, large employers with more than 50 full-time equivalent employees may be assessed a financial penalty if they fail to offer substantially all full-time employees and their dependent children coverage under a health plan that provides minimum essential coverage.

3. Even if the employer offers a health plan providing minimum essential coverage to its full-time employees, the employer may nonetheless incur financial penalties if such coverage is unaffordable or does not provide minimum value, as defined by the ACA and applicable regulations.

4. These penalties are triggered when one or more of the employer’s full-time employees obtains coverage through a health Exchange and receives a tax credit or subsidy in connection with that transaction.

B. Minimum Essential Coverage (MEC)

1. Definition: MEC is defined broadly under the ACA to include basically all employer sponsored group health plans that provide medical care. MEC does not include health FSAs, limited scope dental or vision plans, or supplemental coverage policies. Both self-insured and insured employer health plans qualify as MEC.

2. Penalties: If the Employer fails to offer MEC to substantially all of its full-time employees and their dependent children and at least one full-time employee obtains health coverage through an Exchange and receives a tax credit or subsidy, then the employer must pay a penalty.²

   • The penalty is equivalent to $2,000 per year for every full-time employee in excess of 30 employees. Accordingly, this may result in a very large penalty if even one employee obtains coverage and a tax subsidy through an Exchange.

C. Affordable Coverage

1. Definition: Affordable coverage is defined as costing the employee no more than 9.5% of the employee’s household income for self-only coverage. The test is based on self-only coverage for the employer’s lowest cost health plan regardless of whether the employee enrolls in a higher cost plan or elects coverage including spouse and/or dependents.

   • The employer is unlikely to know the employee’s household income, and accordingly, the proposed regulations offer safe harbors for determining affordability, including using the employee’s W-2 wages.

²The term “substantially all” full-time employees means 95% of the employer’s full-time employees.
2. **Penalties:** If an employer offers MEC that is unaffordable, and at least one full-time employee obtains coverage through an Exchange and is eligible for a premium tax subsidy, then the employer will owe a penalty equivalent to $3,000 per year for each employee who obtains such coverage and is eligible for a tax subsidy.

- The penalty is capped at the amount that would be charged if assessed the penalty for failing to offer MEC ($2,000 per year for every full-time employee in excess of 30 employees).

D. **Minimum Value**

1. **Definition:** A plan fails to offer minimum value if it pays less than 60% of the total average cost of covered benefits provided under the plan. The minimum value calculation takes into account, among other things, employee deductibles and required co-payments.

- Employer contributions to an employee’s health savings account (HSA) and certain amounts contributed to an employee’s Health Reimbursement Arrangement (HRA) may be taken into account in figuring minimum value.

- The current regulations provide three approaches for determining minimum value including a minimum value calculator developed by the government agencies, checklists that compare benefits to a standard plan, and appropriate certification by an actuary. Employers should seek assistance from their health plan provider, third party administrator or actuary in assessing minimum value compliance.

2. **Penalties:** If the employer offers MEC that does not provide minimum value, and at least one full-time employee obtains coverage through an Exchange and is eligible for a tax subsidy, then the employer will owe a penalty equivalent to $3,000 per year for each employee who obtains such coverage and is eligible for a tax subsidy.

- The penalty is capped at the amount that would be charged if assessed the penalty for failing to offer MEC ($2,000 per year for every full-time employee in excess of 30 employees).

E. **Identifying Full-Time Employees for Purposes of the ACA Employer Penalties**

1. Under the ACA, a full-time employee works at least 30 hours per week on average. Each hour of service for which the employee is paid counts, including paid time when no duties are performed including paid vacation, holidays, sick leave, or other paid leaves of absence.
2. For hourly workers, use a record of actual hours for which payment is due; for non-hourly workers, use actual recorded hours of service or an equivalency method which does not understate the actual number of hours worked.

3. Safe Harbor Options - The ACA requires employers to assess and report full-time status on a monthly basis, which causes problems where employees have variable hours. Accordingly, the regulations provide safe harbor procedures involving the following concepts:
   
   • “Measurement Period” - a specified look back period for measuring an employee’s average hours to determine whether the employee has full-time status. For ongoing employees, the period must be between 3 and 12 months in length.
   
   • “Stability Period” - follows the measurement period, and is the minimum period during which an employee must be treated as full-time if the employee was determined to be full-time during the measurement period, and which must be the greater of 6 consecutive months, or the length of the measurement period. For employees determined not to be full-time, the stability period must be no longer than the measurement period.
   
   • “Administrative Period” - an optional period of up to 90 days immediately following the end of the measurement period during which the employer can process eligibility determinations and enroll employees in the employer’s health plan.

4. For educational institutions, the regulations require that an employee who works full-time during the “active portions of the academic year” be treated as a full-time employee.

F. Strategies for Limiting Financial Penalties

The penalty structure favors offering some form of employer sponsored health coverage to full-time employees, even if it does not qualify as affordable or minimum value.

1. Offering MEC to substantially all employees
   
   • Offering a group health plan to all full-time employees and their dependent children up to age 26 may avoid the potential penalty for failure to offer MEC of $2,000 times the total number of full-time employees less 30, even if the plan is not affordable and does not provide minimum value.

2. Offering Affordable Coverage
   
   • To avoid the penalties for unaffordable coverage, only the lowest cost plan that provides minimum value must be considered. It need not be affordable for dependents to avoid the penalty.
Consider offering a minimum value plan that costs no more than 9.5% of any full-time employee’s W-2 wages. This plan can be added to other plan options that are currently offered.

3. Offering a Minimum Value plan
   • Employer contributions to an employee’s HSA or certain types of HRAs may be included in the computation of minimum value offered by the employer’s health plan. Consider offering or enhancing contributions to an employee’s HSA or HRA account to increase the value offered under the plan as measured for ACA purposes.

4. Identifying and controlling the number of full-time employees
   • Employers must be aware of who are their full-time employees for whom they are required to offer appropriate coverage under the ACA or else potentially pay a penalty. Employers must ensure that there is a system in place to accurately and consistently measure and track employees’ work hours. Many employers have considered restructuring their workforce to limit the number of employees defined as full-time under the ACA due to the penalty structure.

5. Recommend: Employers should consult with their attorney, their health plan TPA and insurance broker in exploring various options to ensure compliance with the employer Play or Pay penalties, and to assess the potential risks and costs of non-compliance.

V. ADDITIONAL ACA REQUIREMENTS DELAYED FOR ONE YEAR UNTIL 2015

A. Employer Information Notice Requirements Delayed until 2015

1. The ACA requires employers, insurers and various other entities to file certain information returns with the IRS and the Exchanges containing detailed information about the type of coverage and affordability of their health plans.

2. The date for compliance for filing these returns has been delayed for one year from January 1, 2014 until January 1, 2015.

3. The delay was announced at the same time and in the same notice in which the one year delay in enforcement of the employer Play or Pay penalties was announced. The notice describes the information reports as “integral” to the administration of the employer penalties, and states that additional time was needed to develop systems for assembling and reporting the data required in the information reports.
B. Cap on Out-of-Pocket Expenditures Also Delayed until 2015

1. The ACA places a cap on annual out-of-pocket expenditures (such as co-pays and deductibles) that may be allowed by qualified health plans for essential health benefits of $6,350 for individuals and $12,700 for families.

2. Implementation of the cap was recently delayed for one year from January 1, 2014 until January 1, 2015.

VI. BEYOND 2015

A. Excise Tax on “Cadillac Plans”

1. Forty percent (40%) excise tax on employer sponsored “Cadillac Plans” defined as health plans with premiums that exceed $10,200 for individual coverage or $27,500 for family coverage (with amounts indexed for cost-of-living beginning in 2020). Tax to be imposed on the premium amount in excess of the threshold amount.

2. Employer or plan administrator responsible for paying the tax for self-insured plans; insurer pays for fully-insured plans.


VII. ACA COMPLIANCE ISSUES AND STRATEGIES OF IMMEDIATE AND CONTINUING CONCERN TO EMPLOYERS

A. The Challenge of ACA Compliance as a Moving Target

1. Most employers have been in the process of preparing for ACA compliance for some time now, and in particular, have been assessing and preparing for the consequences of the requirement to offer qualifying and affordable health coverage to their full-time employees in order to deal with the employer mandate and penalties.

2. The various components of the ACA are being implemented over many years, regulations continue to be issued, and for several provisions, implementation has been delayed from the initial enforcement date due to pending additional regulations or additional systems that need to be put in place. Accordingly, employers need to be diligent in keeping up with the current status of the ACA, and making adjustments as additional regulations are issued or delays are announced.
B. Top 5 Recommendations to Address ACA Compliance Now

1. Ensure that employer provided health insurance coverage complies with all required ACA coverage mandates effective since 2010, and make sure that plan documents, Summary Plan Descriptions and all required notices are updated to reflect the current requirements, and are timely sent.

2. Prepare HR personnel and/or administrators to respond appropriately to questions from employees about the Exchanges and the employer’s health plans, and to confirm employee data and coverage if requested by the Exchanges to help determine an employee’s eligibility for premium subsidies.

3. Decide on method to determine whether variable hour employees are full-time for ACA purposes, including applicable measurement period and stability period safe harbors, and implement reliable systems for computing and recording employee hours.

4. Determine the potential impact of the employer “Play or Pay” penalties by properly identifying all full-time employees, prepare for compliance and adjust health benefits as necessary.

5. Plan for future implementation of ACA provisions, including the Cadillac Tax penalties and nondiscrimination rules, by maintaining flexibility to adjust health benefits as necessary.
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Dennis Weedman represents school districts, community colleges, county boards and other units of local government in labor negotiations and employment related matters, including complaints and charges of discrimination, wrongful termination litigation, claims of sexual harassment, civil rights violations and unfair labor practice charges. Dennis also advises clients on the handling of grievances, as well as represents public entities in labor arbitration hearings. He has represented employers in more than 200 arbitration hearings and has handled more than a hundred union organizational cases before the various public sector labor relations boards. Following certification of the bargaining unit, Dennis also serves as a negotiator and advisor for collective bargaining agreements, having negotiated several hundred labor contracts for public employers.

Dennis’ area of practice extends well beyond just labor and employment matters. He counsels clients in all areas of personnel management, including employee leave rights, overtime obligations, and employee disciplinary matters, as well as in the areas of board governance, general education law and student rights and responsibilities. Dennis has served on the Illinois State Bar Association’s Labor and Employment Section and is a frequent presenter for the Illinois Association of School Boards and at statewide conferences, including the Chicago-Kent School of Law Public Sector Labor Relations Conference.

Dennis has twenty years of experience representing public entities in labor and employment disputes. Prior to joining Robbins Schwartz, Dennis served as an Administrative Law Judge with the Illinois Labor Relations Board and was Labor Relations Counsel for the Illinois Department of Central Management Services.

RECENT PRESENTATIONS

PERA Evaluation of Teachers and Principals, Wabash and Ohio Valley Special Education District (July 2012)

Fair Labor Standards Act Update, Continuing Legal Education Presentation, Decatur Bar Association (June 2012)

Education Reform Under Senate Bill 7, Wabash and Ohio Valley Special Education District (July 2011)
Legislative and Judicial Updates, Regional Office of Education #40, Jerseyville, IL (February 2011)

Legal Updates – Family and Medical Leave Act, Regional Office of Education #40 Winter Meeting, Jerseyville, IL (January 2009)

Identifying Pedophile and Grooming Habits of School Employees; Collective Bargaining Implications of New Class Size and RtI Requirements, Wabash and Ohio Valley Special Education District (July 2008)

Implementation of IRS 403(B) Requirements, Mississippi Valley IASBO Luncheon (June 2008)

Current Legal Issues, IASB Wabash Valley Division Business Meeting (March 2008)