1 **HEALTHCARE REFORM**

Employer Shared Responsibility
“Play or Pay”
May 22, 2013

2

These materials are intended to stimulate thought and discussion and to provide the reader with useful ideas and guidance in the areas of healthcare reform. The materials do not constitute, and should not be treated as, legal advice. Although we have made every effort to ensure the accuracy of these materials, neither the authors nor Cox Smith Matthews Incorporated assumes any responsibility for any individual’s reliance on the written information presented during this presentation. Laws and regulations are subject to change at any time.

This PowerPoint presentation is an educational tool that is general in nature and for purposes of illustration only. The materials in this presentation are not exhaustive, do not constitute legal advice and should not be considered a substitute for consulting with legal counsel. Cox Smith has no obligation to update the information contained in this presentation.

<u>CIRCULAR 230 DISCLOSURE</u>: Pursuant to Department of Treasury Circular 230, this presentation is not intended or written to be used, and may not be used by the recipient, for the purposes of avoiding any federal tax penalty which may be asserted.

3 **COVERAGE MANDATE: WHAT EMPLOYERS ARE SUBJECT TO PLAY OR PAY?**

n “Applicable Large Employer” (“ALE”) will be subject to the rule
  n Average of 50 or more Full Time Equivalents (“FTEs”) on business days in prior calendar year
  n Formula: Full-time (“FT”) employees (including seasonal) for each month + FTEs (including seasonal) for each month ÷ 12
    n FT employee = Average of at least 30 hours per week
    n <u>130</u> hours of service in a calendar month is equivalent

4 **COVERAGE MANDATE: WHAT EMPLOYERS ARE SUBJECT TO PLAY OR PAY?**

n Number of FTEs for month = total hours worked by non-FT employees (not more than 120 for any one) ÷ <u>120</u>
  n If a fraction, round down to next lowest whole number
  n Note that the numbers are different for the two rules
n Exception for seasonal employees if—
  n Count exceeds 50 FT employees for 120 or fewer days (or 4 months) in year and employees in excess of 50 employed in that period were seasonal workers

5 **COVERAGE MANDATE: WHAT EMPLOYERS ARE SUBJECT TO PLAY OR PAY?**

n Determining hours of service
  n Hourly employees: Actual hours worked plus paid time off
  n Non-hourly employees: Actual hours worked as above or
    n Days-worked equivalency (8 hours per day)

    - Weeks-worked equivalency (40 hours per week)
    - Anti-abuse rule (e.g., fireman with two 24-hour shifts is not counted for only 2 days)

6 **COVERAGE MANDATE: WHAT EMPLOYERS ARE SUBJECT TO PLAY OR PAY?**

- Other employees: Reasonable rule pending guidance
  - Commission employees, adjunct faculty, transportation, etc.
- Transition rule for employers close to threshold
  - May determine status for 2014 based on 6 or more consecutive months (e.g., March 13 - September 13)

7 **COVERAGE MANDATE: WHAT EMPLOYERS ARE SUBJECT TO PLAY OR PAY?**

<u>Controlled Group Rules</u>

- There is no separate line of business exception
- Related employers are combined for purposes of counting employees for the ALE determination
  - All employees of a controlled group are taken into account when determining whether members of group are ALEs
  - If 50-employee threshold is met by group, then each member is an “ALE member”

8 **COVERAGE MANDATE: WHAT EMPLOYERS ARE SUBJECT TO PLAY OR PAY?**

- Hours of service with one member count against any other ALE for whom the employee provides service
- However: Related employers not combined for purposes of penalty assessment (liability and amount)
  - Each employer will be liable on its own for any penalty it owes

9 **COVERAGE MANDATE: WHAT IS ELIGIBLE EMPLOYER SPONSORED COVERAGE?**

- Offering Eligible Employer Sponsored Coverage (“EESP”) to substantially all FT employees (<u>and dependents</u>) will preclude large “no coverage” penalty
  - EESP is essentially an employer-sponsored plan (insured or self-insured) that provides medical care
  - Large portion of premium cost can apparently be shifted to employees without affecting EESP nature of plan

10 **COVERAGE MANDATE: WHAT IS ELIGIBLE EMPLOYER SPONSORED COVERAGE?**

- EESP is not listed HIPAA-excepted benefits, such as excepted health FSAs, limited-scope dental/vision plans, certain supplemental coverage, on-site medical clinics, etc.
- How minimal can an EESP be?
  - Per guidance, “essential health benefits” condition is not imposed
  - Until future regulations define, required scope remains unclear

11 **COVERAGE MANDATE: THE PENALTIES**

- Penalties provided for in Code §§ 4980H(a) and (b)
- Penalty is triggered, in general, if FT employee is certified as enrolled for Exchange subsidy for a month
  - Subsection (a) penalty (or “no coverage” penalty) applies if employer

    - Failed to offer substantially all FT employees (and dependents) opportunity to enroll in EESP for a month
    - Monthly Penalty = $2,000 X # of FT employees minus 30 ÷ 12

12 **COVERAGE MANDATE: THE PENALTIES**

- Subsection (b) (or "inadequate coverage") penalty applies if employer
  - Offered substantially all FT employees (and dependents) opportunity to enroll in EESP for a month
  - But coverage is not affordable or fails to provide Minimum Value ("MV")
  - Monthly Penalty = lesser of
    - $2,000 X # of FT employees minus 30 ÷ 12 OR
    - $3,000 X # of FT employees with subsidy ÷ 12

13 **COVERAGE MANDATE: THE PENALTIES**

- "Substantially all" defined as 95% of FT employees or, if greater, 5 FT employees
  - Means that failing to offer EESP to as few as 5.001% of FT employees (and their dependents) will cause "no coverage" penalty to apply
  - "Clear and definitive" rule: Inadvertence is not required

14 **COVERAGE MANDATE: THE PENALTIES**

- Must include "dependents" (i.e., children up to age 26)
  - Code § 152(f)(1) definition, including stepchild and foster child
  - Spouses need not be included (so plans that exclude spouses with other coverage may still do so)
  - <u>Transition rule</u>: Any employer that "takes steps" toward offering child coverage during 2014 plan year will not be liable for penalties solely on this basis

15 **COVERAGE MANDATE: THE PENALTIES**

- New guidance on "offer of coverage"
  - Must offer "effective opportunity" to enroll or decline enrollment <u>at least once per year</u>
  - Emphasizes adequacy of enrollment materials and recordkeeping practices
- Failure to offer for one day treated as failure to offer for month
  - Coverage may be terminated for failure to pay premium
  - But COBRA-like 30-day grace period and insignificant shortfall rules are made applicable to employee premium payments

16 **COVERAGE MANDATE: THE PENALTIES**

- New "applicable large employer member" concept
  - Penalty calculated member-by-member for controlled groups
  - But 30-employee-reduction of "no coverage" penalty is allocated across the controlled group (rounded up if a fraction)
    - For example, if there are 3 employers in controlled group, each will subtract 10 employees from their FT employee total

17 **COVERAGE MANDATE: EXAMPLES FOR "NO COVERAGE" PENALTY**

- Cox Co. has 1,000 FT employees and does not offer an EESP to any FT employees
  - 1 FT employee enrolls in subsidized coverage for year
  - Annual Penalty = $2,000 X (1,000 - 30) = $1,940,000

- n Note: Result would be same even if Cox Co. offered EESP to 94.99% of FT employees (and children up to age 26)

18 **COVERAGE MANDATE: EXAMPLES FOR "NO COVERAGE" PENALTY**

- n Smith Co., with 20 FT and 60 half-time (0.5) FTEs, does not offer an EESP to substantially all FT employees
  - n Treated as having 50 FT employees and, thus, subject to rules
  - n 1 FT employee enrolls in subsidized coverage for year
  - n Annual Penalty = $2,000 X (20 - 30) = 0
  - n Smith Co. owes no penalty because only true FT employees are counted (FTEs only count for ALE status)

19 **COVERAGE MANDATE: EXAMPLES FOR "NO COVERAGE" PENALTY**

- n Matthews Co. has 1,000 FT employees, offers affordable plan with minimum value ("A/MV") to ALL FT employees but NO dependent coverage
  - n Question: Whether penalty could apply under either subsection (a) or (b) since it would appear that no FT employee would be eligible for Exchange subsidy (due to A/MV offer)

20 **COVERAGE MANDATE: EXAMPLES FOR "NO COVERAGE" PENALTY**

- n Same as previous slide except Matthews Co. offers A/MV plan to <u>substantially</u> all FT employees but NO dependent coverage
  - n Annual Penalty = $2,000 X (1,000 - 30) = $1,940,000
  - n Can be triggered by one of the 4.99% of FT employees who goes onto the Exchange and receives a subsidy
  - n Matthews Co. can then be penalized because no offer of coverage to dependents

21 **COVERAGE MANDATE: EXAMPLES FOR "INADEQUATE COVERAGE" PENALTY**

- n Sutin Co. has 1,000 FT employees and offers EESP to substantially all (including children up to age 26)
  - n If 200 FT employees enroll in subsidized coverage for year
  - n Annual Penalty = $600,000
    - n Lesser of $2,000 X (1,000 - 30) = $1,940,000 (Example #1) OR
    - n $3,000 X 200 = $ 600,000

22 **COVERAGE MANDATE: EXAMPLES FOR "INADEQUATE COVERAGE" PENALTY**

- n If 647 (or more) enroll in subsidized coverage for year
- n Annual Penalty = $1,940,000 (same as Example #1)
  - n Lesser of $2,000 X (1,000 - 30) = $1,940,000 (Example #1) OR
  - n $3,000 X 647 = $1,941,000

23 **COVERAGE MANDATE: EXAMPLES FOR "INADEQUATE COVERAGE" PENALTY**

- n Smith Co., with 20 FT and 60 half-time (0.5) FTEs, offers EESP to substantially all FT employees
  - n One FT employee goes onto Exchange and receives a subsidy
  - n "Inadequate coverage" penalty = $3,000 X 1
    - n But can never be more than "no coverage penalty," which is $2,000 X (20 - 30) = 0
  - n Penalty is still 0 under "lesser of" formula

24 **COVERAGE MANDATE: HOW TO COMPLETELY AVOID A PENALTY**

n No penalty possible with offer of an affordable plan that provides MV to all FT employees (and children up to age 26)

n FT employees offered this kind of plan are not eligible for subsidized Exchange coverage and, therefore, cannot trigger a penalty for the employer

n When a plan provides MV and when a plan is considered affordable discussed in next slides

25 **COVERAGE MANDATE: WHAT IS MINIMUM VALUE?**

n MV not satisfied if

n Plan's "share of the total allowed costs of benefits provided under the plan is less than 60% of such costs"

n It is a measure of cost-sharing under the plan (related, but distinct concept from "actuarial value" for Qualified Health Plans on Exchanges)

n Does not include premiums in calculation

26 **COVERAGE MANDATE: WHAT IS MINIMUM VALUE?**

n Three possible approaches for determining MV

n MV calculator (available on HHS website)

n Various design-based safe harbors in the form of checklists (to be further developed), or

n Proposed example of safe harbor plan design:

(1)A plan with a $3,500 integrated medical and drug deductible, 80% plan cost sharing, and a $6,000 maximum out-of-pocket limit for employee cost-sharing

27 **COVERAGE MANDATE: WHAT IS MINIMUM VALUE?**

(2)A plan with a $4,500 integrated medical and drug deductible, 70% plan cost-sharing, a maximum out-of-pocket limit, and a $500 employer contribution to an HSA; and

(3)A plan with a $3,500 medical deductible, $0 drug deductible, 60% plan medical expense cost-sharing, 75% plan drug cost-sharing, a $6,400 maximum out-of-pocket limit, and drug co-pays of $10/$20/$50 for the first, second and third prescription drug tiers, with 75% coinsurance for specialty drugs

n If other 2 methods cannot be used, appropriate certification by actuary that plan provides MV

(1)

28 **COVERAGE MANDATE: WHAT IS MINIMUM VALUE?**

n HRA and HSA amounts assumed to be used by employees for cost-sharing

n For HRA, "appropriate portion" of employer contributions can be counted toward MV (i.e., added to the value of associated major medical plan)

n But not amounts carried forward from a prior year

n Similarly for HSA, "appropriate portion" of employer contributions can be counted toward MV (i.e., added to the value of associated HDHP)

n We count only the appropriate portion because the full amount may not be used each year

29 **COVERAGE MANDATE: NEW GUIDANCE ON MINIMUM VALUE**

n MV Percentage determined using the anticipated spending for a standard population (based on typical self-insured health plans) and taking into account all benefits provided by the plan that are included in any one of the EHB-benchmark plans

- n Wellness Incentives that reduce either cost-sharing or participant contributions (premiums) not taken into account as amounts paid by the plan for purposes of determining the MV Percentage or the plan's affordability
  - n Exception: those aimed at tobacco use

30 **COVERAGE MANDATE: NEW GUIDANCE ON MINIMUM VALUE**

- n Transition rule for existing wellness incentives for plan years before January 1, 2015: employer will not be subject to employer penalty for 2014 year if coverage would have met A/MV standard for employee if he/she had satisfied wellness program requirements
- n Plans should use the MV Calculator to measure standard plan features
  - n Can adjust result based on an actuarial analysis of plan features outside the calculator's parameters
  - n Alternatively, satisfy a safe harbor plan design (previous slide)
- n

31 **COVERAGE MANDATE: WHAT IS THE AFFORDABILITY TEST?**

- n Affordable if employee cost for self-only coverage in lowest-cost MV plan = 9.5% of household income
  - n By necessity, affordability determination for purposes of Exchange subsidy cannot be finalized until tax year-end
    - n Employee who receives subsidy may have to repay as part of tax return if household income turns out to be too high
- n But remember: Subsidy and employer-penalty determinations are separate

32 **COVERAGE MANDATE: WHAT IS THE AFFORDABILITY TEST?**

- n Since employers cannot know household income, special safe harbors apply for employer penalty purposes (discussed next)
  - n Note: HRA and employer HSA contributions do not affect affordability calculation
    - n Generally cannot be used by employees to pay premiums
    - n Later guidance may address those HRAs that can pay premiums
- n Wellness incentives and affordability: No new guidance

33 **COVERAGE MANDATE: AFFORDABILITY SAFE HARBORS**

1) Employee Form W-2 earnings safe harbor
  - n For full-year offer of coverage, determined after year-end based on W-2 wages and required employee contribution for year
    - n Employee contribution must be consistent amount or percentage of W-2 wages during year (discretionary adjustments not permitted)
    - n Note: Pre-tax deductions (Cafeteria Plan, 401(k)) reduce W-2
  - n For partial-year offer of coverage, multiply W-2 wages by fraction equal to months coverage was offered/period of employment

34 **COVERAGE MANDATE: AFFORDABILITY SAFE HARBORS**

2) Employee rate of pay safe harbor
  - n Hourly rate of pay on 1st day of coverage period times 130 hours OR
  - n monthly salary on 1st day of coverage period

- Available only if wages/salary do not go down during period

3) Federal poverty line ("FPL") safe harbor (based on FPL for single individual in state where employee is employed)

35 **COVERAGE MANDATE: AFFORDABILITY SAFE HARBORS**

- Employer's reliance on safe harbors has no effect on employee eligibility for Exchange subsidy (which is still based on household income)
  - But no employer penalty for employee who gets subsidy because household income is less than safe harbor amount
  - Though rare, household income could be less due to earned income credit, self-employment deductions, and other factors

36 **COVERAGE MANDATE: TRANSITION ISSUES**

- Complicated transition rule for "fiscal year," or non-calendar year plans maintained as of December 27, 2012
  - No penalties for months of 2013 year that fall in 2014 for
    - Employees who would be eligible for coverage on 1st day of 2014 plan under eligibility terms of plan in effect December 27, 2012

37 **COVERAGE MANDATE: TRANSITION ISSUES**

    - Other employees (not so eligible) if at least 1/4 of employees are covered under fiscal year plan as of December 27, 2012 <u>or</u> at least 1/3 of employees are offered coverage under such a plan
    - But only if employees in both categories are offered affordable MV plan no later than 1st day of 2014 plan year
- Code § 6056 reporting still applies on calendar-year basis in 2014
- Non-calendar-year cafeteria plan: One midyear election or election change allowed without status change
  - Must amend plan by December 31, 2014, but can be retroactive

38 **COVERAGE MANDATE: EMPLOYER RESPONSE?**

- Evaluation of potential penalties must become part of benefit design and planning
  - Particular responses will depend on many factors, including size of workforce, current benefit practices, perceived need by employees for health coverage, etc.
- Penalty structure favors offer of at least EESP
  - "Play or pay" actually misleading: Even employers that play can be liable, but total penalty will usually be smaller
    - "Inadequate coverage" penalty is assessed only on number of FT employees who enroll in subsidized Exchange coverage

39 **COVERAGE MANDATE: EMPLOYER RESPONSE?**

  - CBO projects $117 billion between 2012- 2022 (based on July estimates) in employer penalties
- Incentive is to offer employer coverage to all FT employees and dependents to avoid substantial "no coverage" penalty
  - Employers with large number of FT employees likely already providing coverage and cannot risk this penalty
  - Remember: Just one FT employee can trigger the huge no coverage penalty

40 **COVERAGE MANDATE: EMPLOYER RESPONSE?**

- n ALEs with close to 30 FT employees have much smaller "no coverage" penalty exposure and, thus, might not provide employer coverage
  - n But even these employers will likely start to offer EESP (requiring employees to pick up as much of cost as needed) to avoid what will likely be the higher no coverage penalty
- n Appears that 100% employee-paid plan can still be EESP
  - n But this may make it more likely, as a practical matter, that employees will seek subsidized Exchange coverage

41 **COVERAGE MANDATE: EMPLOYER RESPONSE?**

- n Further incentive is to offer at least a MV plan to all FT employees
  - n Non-MV plan allows all FT employees eligible to enroll for Exchange subsidies to do so (even if plan is affordable)
- n Then the incentive is to make the MV plan affordable to as many FT employees as possible
  - n Only those FT employees for whom plan is not affordable will be eligible for subsidized Exchange coverage
    - n Thus, decreasing the multiplier and therefore the penalty

42 **COVERAGE MANDATE: EMPLOYER RESPONSE?**

- n Offering "buy-up" plan will usually be permissible
  - n This may be affected by Code nondiscrimination rules (key employee tests, etc.)
- n Best protection: Offer an affordable plan that provides MV to all FT employees
  - n Note: Not enough to offer this to "substantially all" because those not offered will remain subsidy-eligible

43 **COVERAGE MANDATE: EMPLOYER RESPONSE?**

- n Employers not already offering A/MV
  - n Might reduce value of current plans (assuming they exceed MV) and use savings to increase value of more basic plans or to cover more employees, or both
  - n Could require higher-income employees to contribute more to make plan affordable to lower-income employees
  - n Consider employee premium contributions start to be stated as percentage of income instead of fixed amount

44 **COVERAGE MANDATE: EMPLOYER RESPONSE?**

- n Penalties are not deductible while employer health coverage provides many tax advantages
  - n FICA tax savings, coupled with employer tax deduction for plan costs, may exceed difference between subsection (a) penalty and cost to provide health coverage
- n Increased salary needed if no plan offered
  - n "Equalizing" through compensation will cost more than the cost of plan due to income/employment tax associated with compensation
- n Business factors
  - n Company culture, high-value workforce, impact on productivity, public and government relations

45 **COVERAGE MANDATE: EMPLOYER RESPONSE?**

- n Reported shift toward more part-time ("PT") employees

- PT employees who enroll in subsidized Exchange coverage do not trigger any penalty for employer
  - Restaurant/retail companies reportedly weighing this approach against potential impact on workforce/productivity
- There could be potential liabilities for reducing hours to avoid play or pay
  - ERISA § 510 and employment discrimination claims?
  - Labor law and Healthcare Reform discrimination issues?

46 **COVERAGE MANDATE: OTHER CONSIDERATIONS**

- Whether Exchanges work as intended
  - If Exchange is too expensive, employees may not be able to afford coverage there even with subsidies
- Whether workforce seeks Exchange coverage
  - Large number of young invincibles or more mixed workforce
- Whether workforce is eligible for subsidies
  - Examples: Large number of high-income employees or employees with other coverage
- How much it costs to provide employer plan
  - Employers may be able to shift more or less significant part of any increased cost to employees

47 **SUBSIDIES THROUGH THE EXCHANGE**

- For 2014, subsidies are provided to assist eligible lower-income individuals to purchase Qualified Health Plans
  - Key: Employer play or pay penalty is triggered if a FT employee enrolls in such "subsidized Exchange coverage"
- Subsidy includes tax credits and cost-sharing reductions
  - Question: Are subsidies available in federally facilitated Exchanges?
  - IRS Regulations say yes, but some challengers say language of Code § 1401(b)(2) provides subsidies only in state-based Exchange

48 **ELIGIBILITY FOR EXCHANGE SUBSIDIES**

- An individual is not eligible if—
  - Not a citizen or legal resident
  - Has Household Income greater than 4 times FPL (about $46,000/individual or $94,000/family of 4)
  - Offered enrollment in ER Coverage providing MV and that is "affordable" to employee
  - Actually enrolled in ER Coverage, regardless of MV or affordability
- Eligible for other specified coverage, including Medicare Part A, Medicaid, CHIP, TRICARE, etc.

49 **SUBSIDIES THROUGH THE EXCHANGE**

- Based on FPL, individuals contribute specified percentage of income for coverage
  - Tax credit covers remainder of premium
  - Cost-sharing reductions also available to some
- Note: Many states refusing Medicaid expansion (including Texas)
  - Expansion raises eligible income level from 100% to 133% FPL; makes certain

groups eligible who were not before
    - In these states, certain low-income employees who might have been Medicaid-eligible could instead get subsidies

50 **ELIGIBILITY FOR EXCHANGE SUBSIDIES**

- Exchanges will make eligibility determinations
    - Will make a certification to employer if employee enrolls in Qualified Health Plan and Exchange subsidy is allowed or paid
- Not clear if employers will be able to catch and correct problems through appeal in administrative process
- Per January 2013 proposed HHS regulations, certification applies only to advance payment of Exchange subsidy
    - Some employees may not opt for advance payment
    - For employees claiming credit on tax returns instead, IRS will provide notice to employer

51 **ELIGIBILITY FOR EXCHANGE SUBSIDIES**

- Employers should consider the possible administrative impacts of Exchange-related information requests when employees seeking Exchange coverage need information about employer-provided plans

52 **NOTIFICATION REGARDING STATE EXCHANGES**

- PPACA required that, by March 1, 2013, employers must notify current employees (and future employees at time of hire) of
    - existing Exchange's services and contact information
    - availability of premium assistance for Exchange-purchased insurance if employer coverage is "unaffordable" (employer contribution < 60%)
    - unavailability of employer subsidy for insurance purchased through Exchange
- FAQ published in January stated that employers will <u>not</u> be required to comply until regulations are issued. Will likely be in Fall 2013, in connection with open enrollment for Exchanges

53 **NOTIFICATION REGARDING STATE EXCHANGES**

- Premium assistance takes the form of subsidy payments to a Qualified Health Plan on behalf of the individual
- Takes the form of an advanced credit payment
- Exchange will determine whether individual qualifies for premium assistance
- Has been challenged as to whether premium assistance is available only under state Exchanges or under federal Exchange as well

54 **EMPLOYER INFORMATION RETURN**

- New Code § 6056 Information Return
    - Must be filed by employers subject to the employer mandate and will be used by IRS to administer penalties
    - Requires detailed information about employer coverage, starting with coverage provided in 2014, including—
        - Information on whether employer offers employer coverage
        - Number of FT employees and identifying information about FT employees offered coverage

55 **EMPLOYER INFORMATION RETURN**

n Also requires for employer that offers employer coverage, information on—
  n Monthly premium for lowest-cost options under plan
  n Employer's share of total allowed costs of benefits under plan and length of any waiting period
n A written statement must also be provided to FT employees identified in report by January 31 of following year

56 **WHO IS CONSIDERED A FULL-TIME EMPLOYEE?**

n The statute envisions FT employee status being determined month-by-month in real time
  n Some employers may not know until month is over which employees are FT
  n By then it is too late to offer coverage
    n Not a problem with standard FT or PT schedules, but will be difficult for employees whose hours fluctuate ("variable hour employees")

57 **WHO IS CONSIDERED A FULL-TIME EMPLOYEE?**

n Safe harbors permit FT/PT status to be "locked-in" for longer than one month in order to identify—
  n Total number of FT employees (for subsection "no coverage" penalty)
  n Who must be offered coverage and who's a FT employee with Exchange subsidy (for "inadequate coverage" penalty)
n An employee "locked-in" as PT cannot trigger penalty

58 **WHO IS CONSIDERED A FULL-TIME EMPLOYEE?**

n Different categories of employees contemplated
  n Ongoing employee
  n New employee expected to work FT hours
    n Penalty will not apply solely because employer does not offer coverage during first 3 calendar months of employment (in line with the 90-day waiting period limit)
    Ø But note, 90 days ? 3 months. Must offer coverage no later than 91st day per new guidance

59 **WHO IS CONSIDERED A FULL-TIME EMPLOYEE?**

  n New variable hour ("VH") employee
    n When hired, cannot reasonably be determined if employee will average at least 30 hours per week
    n As of January 1, 2015, new employee working FT but expected to work for limited duration cannot be treated as VH employee
  n New seasonal employee
    n Through at least 2014, employers permitted to use reasonable, good faith interpretation of "seasonal"

60 **DETERMINING FULL-TIME EMPLOYEE STATUS– SAFE HARBOR**

n Measurement period (period of 3 to 12 months)
  n "<u>Standard</u>" measurement period for ongoing employees
    n Examples: Calendar year, plan year, or a period timed to end when employer's

open enrollment period begins

- n “Initial” measurement period for new VH employees
  - n Will usually differ from standard measurement period (e.g., begin on hire date or first day of month after hire date)
  - n Limited permission granted to align with payroll periods

61 **DETERMINING FULL-TIME EMPLOYEE STATUS– SAFE HARBOR**

- n Stability period (when FT/PT status is locked in)
  - n Length may vary, but must be same for new VH and ongoing
  - n Transition rule: For stability periods beginning in 2014, measurement period in 2013 may be as short as 6 months
    - n So à must begin by July 1, 2013

62 **DETERMINING FULL-TIME EMPLOYEE STATUS– SAFE HARBOR**

- n Administrative period—
  - n Period after the measurement period, and before the stability period, for determination of FT status and enrollment of eligible FT employees
  - n Maximum length is 90 days, but due to special limit—
    - n Initial measurement period plus administrative period cannot extend past last day of 1st calendar month beginning on or after 1-year anniversary of new variable employee’s hire date
    - n Means: Can’t make wait more than 13 months plus fraction of month

63 **DETERMINING FULL-TIME EMPLOYEE STATUS– SAFE HARBOR**

- n Different measurement/stability periods allowed—
  - n For union/non-union; salaried/hourly; employees of different entities; employees in different states
- n Ongoing employees (employed for at least one complete standard measurement period)
  - n Terminated ongoing employee cannot be treated as new employee unless separated for 6 months (or rule of parity)

64 **DETERMINING FULL-TIME EMPLOYEE STATUS– SAFE HARBOR**

- n Ongoing employees averaging at least 30 hours per week for standard measurement period will be FT employees for entire subsequent stability period
  - n Employees averaging less are not FT employees
  - n If employee is FT employee, stability period is the longer of 6 months or the standard measurement period
  - n If employee is not FT employee, stability period may not be longer than the standard measurement period
    - n Subject to 2013/2014 transition rule

65 **DETERMINING FULL-TIME EMPLOYEE STATUS– ONGOING EMPLOYEE EXAMPLE**

- n Cox Co. elects the following safe harbor periods
  - n Measurement period October 15, Year 1 to October 14, Year 2
  - n Administrative period October 15, Year 2 to December 31, Year 2
  - n Stability period January 1, Year 3 to December 31, Year 3
- n Katherine was hired full-time by Cox Co. in 2007 and averaged 33 hours per week

from October 15, 2014 to October 14, 2015 (measurement period)

66 **DETERMINING FULL-TIME EMPLOYEE STATUS– ONGOING EMPLOYEE EXAMPLE**

- Katherine must be treated as a FT employee for the stability period January 1 to December 31, 2016
  - Cox Co. will use the administrative period, October 15 to December 31, 2015, to confirm eligibility and complete 2016 enrollment

67

- Initial measurement period tied to hire date and administrative period cannot exceed 90 days
  - When combined with initial measurement period, cannot extend past last day of 13th month after hire date
  - Must re-test during first standard measurement period

68

- Stability period—
  - If employee is FT employee, stability period is the longer of 6 months or the initial measurement period (Subject to 2013/2014 transition rule)
  - If employee is not FT employee, stability period may not be longer than initial measurement period plus 1 month (Subject to 2013/2014 transition rule)
  - If change in employment status, must treat new VH or seasonal employee as FT employee by 4th month following

69

- EXAMPLE—Assumptions:
  - Mary's hire date is May 10, 2014
  - Initial measurement period is 12 months, starting on hire date: May 10, 2014 to May 9, 2015
  - Standard measurement period is October 15 to October 14
  - Stability period is 12 months
  - Administrative period for new employees runs from last day of initial measurement period (May 9, 2015) to end of 1st calendar month that begins on or after last day of initial measurement period (June 30, 2015) (due to special limit)

70

  - Administrative period for ongoing employees runs from October 15 to December 31 (less than 90 days)
- Example: New VH Employee Works FT
  - Mary averages 32 hours per week from May 10, 2014 to May 9, 2015
  - Mary must be treated as FT employee from July 1, 2015 to June 30, 2016 (12-month stability period after initial measurement period and administrative period)
  - Mary's hours must also be measured October 15, 2014 to October 14, 2015—i.e., Mary's first standard measurement period

71

- If Mary averaged at least 30 hours per week during the first standard measurement period, Mary needs to be treated as FT employee for stability period July 1 to December 31, 2016

- Stability period July 1 because Mary “earned” FT employee status for January 1 to June 30, 2016 based on initial measurement period

72

- Example: New VH Employee Goes FT to PT
- Mary averages 32 hours per week from May 10, 2014 to May 9, 2015
  - Mary must be treated as FT employee from July 1, 2015 to June 30, 2016 (12-month stability period)
  - Mary’s hours must also be measured October 15, 2014 to October 14, 2015—i.e., Mary’s first standard measurement period

73

- If Mary averages less than 30 hours per week during first standard measurement period, Mary will not be FT employee for the stability period, July 1 to December 31, 2016
  - But Mary must still be treated as FT employee through June 30, 2016 since that status was “earned” based on the initial measurement period
  - Mary’s PT status does not take away FT status already earned

74

- Strategy on timing and length of periods will depend on workforce and work scheduling
  - Longer measurement periods provide more certainty but lock in employee status for longer
- Numerous unresolved issues remain, including—
  - Treatment of commissioned, salaried, other employees?
  - Treatment of locked-in FT employees actually working PT
- Not clear if employee can change cafeteria plan election based on lower pay
- Unsure of impact on COBRA qualifying events and procedures

75

(Later in 2013)

- PCORI fees due for some plans (July)
- Exchange Notice (October 1)
- Exchange Open Enrollment (Fall)

76

2014

- Annual limits prohibited
- Cost-sharing limitations
- 90-day waiting period
- Exchanges
- PCE prohibition
- Reinsurance fees
- Reporting of health insurance coverage (Code §§ 6055 & 6056)
- Pay or Play
- Individual mandate

n

77 **COX SMITH MATTHEWS INCORPORATED EMPLOYEE BENEFITS ATTORNEYS:**

Joshua A. Sutin
112 E. Pecan Street, Suite 1800
San Antonio, Texas 78205
(210) 554-5500 tel
(210) 226-8395 fax
www.coxsmith.com