

# THE AFFORDABLE CARE ACT

## A Valuable Update!

*Presented by:*

**R. Pepper Crutcher Jr.**  
Partner, Balch & Bingham LLP

**Andy Impastato**  
Vice President – Legal & Compliance

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# Agenda

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- Background
- Overview on How ALEs Can be Penalized
- HHS Subsidy Notice Process
- IRS Penalty Assessment Process
- Employee Discrimination & Retaliation Protections
- Employer Considerations
- Questions & Answers

# ALE and Penalties Overview

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- How Does the IRS Know I am an ALE?
  - Every EIN within a controlled group is an ALE Member; the group is an ALE
  - Each EIN reports on Forms W-2 and 1094-C your EE data
  - Form 1094-C also reports other ALE Members in your controlled group
  - Insurers report your enrollment on Form 1094-B

# ALE and Penalties Overview

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- How Can ALE be Penalized? (**Big or (a) Penalty**)
  - ALEs that fail to offer minimum essential coverage to at least 95% (*70% for 2015*) of their full-time employees and their dependents will be subject to a \$2,160 (*\$2,080 for 2015*) per employee penalty if **any** full-time employee goes to an Exchange and qualifies for a subsidy. Penalty is calculated based on the total number of full-time employees minus 30 (*80 for 2015*)

# ALE and Penalties Overview

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- How Can ALE be Penalized? **(Little or (b) Penalty)**
  - ALEs that offer coverage will be subject to a \$3,240 (*\$3,120 for 2015*) per employee penalty if the coverage is either not affordable or does not meet minimum value, and as a result, any full-time employee qualifies for a subsidy. Penalty is calculated based on the number of full-time employees who obtain a subsidy (with a “big” penalty cap)

# ALE and Penalties Overview

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- But We Used Leased Workers . . .
  - Every worker you “control” is your ACA “employee,” even if on another’s payroll
  - “Common law employee” test – Form SS-8
  - Report them on Form 1095-C to claim credit for leasing company coverage offers to them or pay taxes if IRS finds them
  - APTC subsidies reveal them to IRS

# How it is Suppose to Work

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- EE Must Apply for Subsidy
  - HHS Marketplace / Exchange Application
    - Income information
    - ER GHP coverage information
      - EE offered?
      - Affordability
      - Minimum Value
      - Any changes for next year

# How it is Suppose to Work

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- HHS “Must” Notify ER When EE Receives Subsidy
  - EE is eligible to receive subsidized coverage
  - EE actually enrolls in Exchange coverage
  - Notice must include:
    - EE’s identity
    - EE is eligible for subsidy
    - ER may be liable for ER Mandate penalty
    - ER’s opportunity to appeal



# How it is Suppose to Work

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- Other Inquiries
  - Exchange may also contact ER for other information
    - Whether EE is eligible for compliant coverage
    - Whether EE is enrolled in compliant coverage
  - Providing a quick response will benefit ER
    - Head of Subsidy Notice and Penalty Notice
  - Providing a quick response will benefit EE
    - If qualified erroneously, minimize individual tax liability

# How it Really Works for 2015

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- Applicant identified you as the employer
- HHS did not notify you but did notify IRS of subsidy certification
- IRS cross-checked against 2015 employer Forms 1094-C and 1095-C employee tax returns
- Assumed correct unless disproven
  - ALE would have to appeal IRS penalty assessment notice

# How it Really Works for 2015

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- When will we hear from the IRS?
  - 3 year limit for assessment (January 2018)
  - After reconciliation of 2015 HHS certifications with 2015 returns but not before election
  - 12/16 to 9/17, probably
  - IRS may deliver 2015 and 2016 back-to-back or bundled

# How it Really Works for 2015

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- What do we do when we hear from the IRS?
  - No published guidance to date on:
    - Form of the notice;
    - Its recipient (see Form 1094-C);
    - Response time or format
  - Notice > assessment > demand > payment (10 days) or collection
  - You may pay and sue to get it back

# How it Really Works for 2016

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- Will we ever hear from HHS?
  - CMS issued FAQ guidance
    - Beginning in 2016, all FFEs will begin to notify ERs if one of their EEs received a subsidy
      - For at least one month in 2016
      - ERs will not receive notices for 2015
    - First HHS Notices were sent out in June, 2016
    - Sent to ER address on Marketplace application
      - What if EE provides incorrect information?
      - What about ERs with different locations?

# How it Really Works for 2016

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- If I receive an HHS Notice, should I appeal?
  - Exchange Notice does not trigger a penalty by itself
  - If an ALE believes coverage was compliant and EE should not be eligible for a subsidy, it may wish to appeal
    - Ensure EEs are not mistakenly receiving subsidies
    - Head off IRS penalty notice

# How it Really Works for 2016

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- How do I appeal?
  - HHS will handle appeal process for FFEs
    - ER will have 90 days from date of notice to appeal
    - Form is available on Healthcare.gov
    - Upon receipt from ER, HHS must timely acknowledge receipt and explain process
    - HHS must notify EE and provide instructions on how to submit additional information

# How it Really Works for 2016

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- What will happen after I appeal?
  - HHS may accept appeal but request additional information
  - ER will have 30 days to submit additional information
  - Information can include
    - Documents showing coverage was offered to EE
    - Documents showing EE's job based income
    - Written proof of affordability and MV



# How it Really Works for 2016

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- What will happen after I appeal?
  - HHS may **not** accept appeal
  - You contested your employer mandate exposure but not the employee's APTC eligibility
    - Part-time employee
    - EE in limited non-assessment period
    - EE no longer employed
  - Only IRS can resolve your appeal issues
  - Should ER still appeal HHS Notice?

# How it Really Works for 2016

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- HHS appeal mechanics
  - HHS will handle appeal process for FFEs
    - Appeal will be reviewed *de novo*
    - ER must be provided opportunity to review any information relating to affordability
    - ER must be provided opportunity to review any additional information EE submitted
    - HHS must provide decision to ER and EE within 90 days from the date the appeal was received

# How it Really Works for 2016

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- HHS appeal mechanics (continued)
  - HHS will handle appeal process for FFEs
    - If the ER appeal is successful, EE will receive a notice “encouraging” he or she to update Exchange application
    - Notice will also advise that failure may result in tax liability
    - Appeal decision does not foreclose ERs opportunity to make any future appeals with respect to IRS penalty notice

# How it Really Works for 2016

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- Now what?
  - HHS issued the first batch of notices in June, 2016 based on 2016 Marketplace open enrollment
  - 2016 Forms 1094-C and 1095-C are due to IRS by 3/31/17 (if e-filed), not 6/30/17
  - EEs file individual tax returns as usual
  - IRS may have the needed 2016 data by May 2017
  - 2015 **and** 2016 assessments possible between 12/16 and 6/17

# How it Really Works for 2016

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- I owe a penalty – how much?
  - Big (a) penalty example (2016)
    - 990 FT EEs (941=95%)
    - $990 - 30 = 960$
    - $960 \times \$180 = \$172,800$  per month
    - \$2,073,600 per year (if applicable)

# How it Really Works for 2016

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- I owe a penalty – how much?
  - Little (b) penalty example (2016)
    - 990 FT EEs (941=95%)
    - 30 not offered affordable, MV MEC
    - 30 decline employer-sponsored coverage
    - $30 \times \$270 = \$8,100$  per month
    - \$97,200 per year (if applicable)

# How it Really Works for 2016

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- Common ER mandate exposure scenarios
  - Big (a) penalty
    - ALE chose to pay instead of play
    - Misclassification of >5% of FT workers
  - Little (b) penalty
    - Unintentional (or intentional) unaffordable offers
      - FPL is only true safe harbor
      - Late offers
  - Fissured workplace enforcement program

# Employee Protections

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- ACA has Specific Rules to Protect EEs
  - ACA amended the FLSA to include retaliation protections
  - ERs are prohibited from discharging or discriminating against an EE with respect to compensation, terms, conditions or other privileges of employment
  - **By opening the HHS notice and identifying the EE, you put a target on your back**



# Employee Protections

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- Prohibition applies to:
  - EE received a subsidy
  - EE provided (or is about to provide) information to the ER, federal or state government regarding any violation of ACA
  - EE testified (or is about to testify) regarding any violation
  - EE assisted or participated in a violation proceeding
  - EE objected to or refused to participate in activity that violates ACA

# Employee Protections

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- Prohibition is broad
  - All EEs (not just FT EEs)
  - Job applicants
  - Former EEs
- ERs are prohibited from discharging, intimidating or disciplining any EE in connection with a protected activity

# Employee Protections

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- Procedures are same as whistleblower protections under the CPSIA
  - EE must file complaint with OSHA within 180 after the alleged violation occurs
  - If OSHA finds a violation, it will order relief
    - Reinstatement
    - Backpay
    - Restoration of benefits
    - Attorney fees and other expenses

# Employee Protections

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- Procedures are same as whistleblower protections under the CPSIA (continued)
  - If OSHA does not find a violation, it will notify the parties of its finding
  - Findings (either way) may be appealed
    - ALJ within 30 days of OSHA finding
    - Additional judicial proceedings are possible
  - ER who believes complaint was frivolous may seek attorney fees (up to \$1,000)
    - ER must file a request for hearing within 30 days of preliminary order

# Employer Considerations

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- Meticulous Recordkeeping
  - Documenting Offers of Coverage
    - EE had an effective opportunity to enroll at least once per plan year
      - Adequate notice and adequate time to accept
  - Documenting Waivers of Coverage
    - EE had an effective opportunity to decline
    - Written declination signed by EE
      - What if ALE cannot obtain one from every EE?
  - Accurate IRS Section 6056 reporting
    - Moving forward

# Employer Considerations

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- Policies & Procedures
  - Appeal Process for HHS Notices
    - Should an ER Appeal?
    - Who is going to handle?
      - **Outsource IRS notices and appeals**
  - Appeal Process for IRS Notices
    - Who is going to handle?
  - Updating existing anti-retaliation policies
    - EE handbooks
  - Staff training
    - “Firewall” – if process will remain internal

# Questions & Answers

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