



# Patient Protection & Affordable Care Act

*Understanding Management Liability Exposures Created by the PPACA*

May 7, 2015

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*Professional Liability Underwriting Society*

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- Provide an Overview of the Patient Protection and Affordable Care Act (“PPACA”)
  - Individual Mandate
  - Healthcare Exchange
  - Employer Mandate
- Explain Additional Employer PPACA Obligations
- Management Liability Exposures
- Discuss Employer Responses to PPACA

- Health insurance for 31 million uninsured by 2019
  - US Citizens and legal residents required to procure health insurance
  - “Large Employer” obligated to provide health insurance or face potential tax penalties
- Legislative History

- For 2014, individuals\* are required to obtain health insurance.
- Individual Tax Penalty for failing to obtain health insurance:

Year	Tax Penalty (greater of)
2014	\$95 per adult, up to a maximum of \$285 per family, or 1% of family income
2015	\$325 per adult, up to a maximum of \$975 per family, or 2% of family income
2016	\$695 per adult, up to a maximum of \$2085 per family, or 2.5% of family income

\*There are certain exceptions. For example, prisoners are not required to obtain health insurance.

# How will Health Insurance be Obtained?

Resource	Parameters
An Employer's Plan	<ul style="list-style-type: none"><li>• Large Employer obligated to provide coverage or pay excise tax</li><li>• 2015: Large Employer 100+ employees</li><li>• 2016: Large Employer 50+ employees</li></ul>
Health Insurance Exchange	<ul style="list-style-type: none"><li>▪ Marketplace to purchase health insurance</li><li>▪ Premium contingent on coinsurance and co-pays</li><li>▪ Tax credits will be provided to purchasers who make between 100% and 400% of federal poverty level</li></ul>
Medicaid	<ul style="list-style-type: none"><li>▪ Only in states that opted to expand Medicaid</li><li>▪ Only for individuals/families making less than 133% of federal poverty level.</li></ul>

- Healthcare subsidies are available to individuals on the exchanges for those making between 100% and 400% of Federal Poverty Level (“FPL”)

Household Size	100% of FPL (2014)	400% of FPL (2015)
1	\$11,490	\$45,960
2	\$15,510	\$62,040
3	\$19,530	\$78,120
4	\$23,550	\$95,200

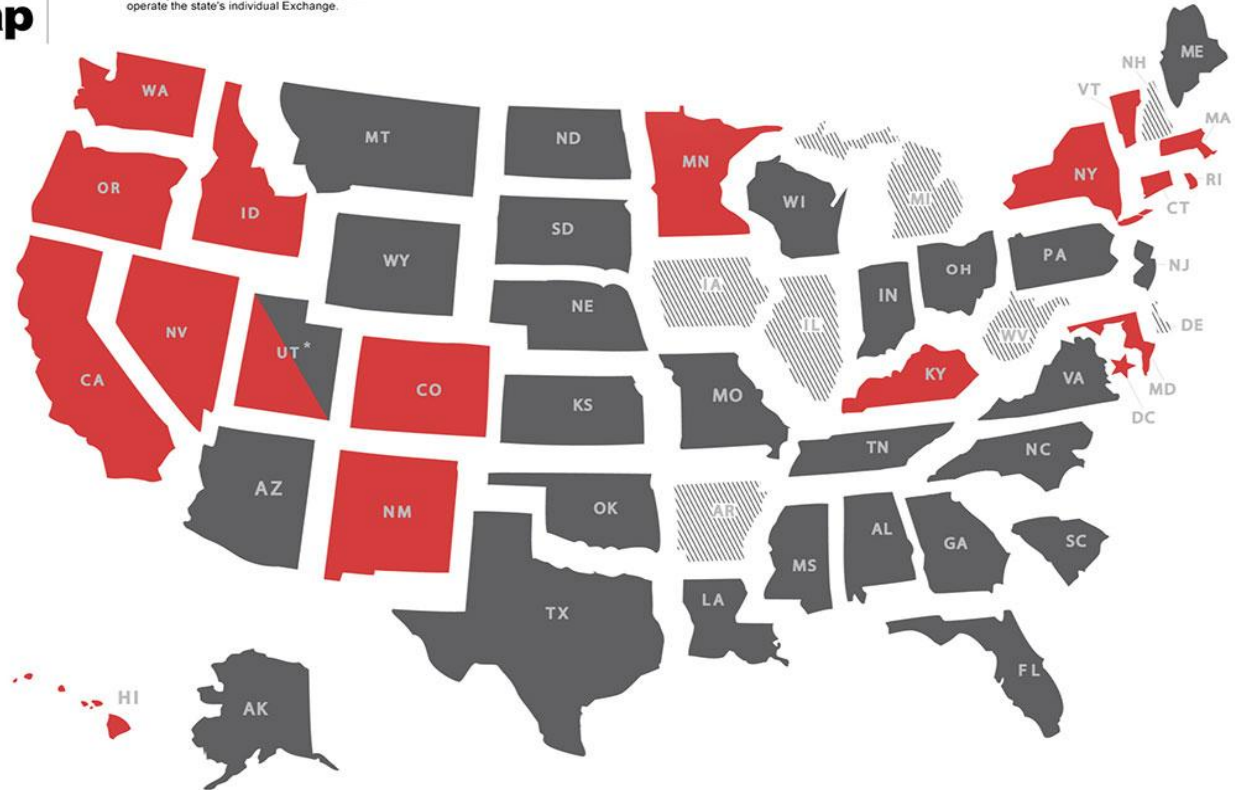


## State Health Insurance Exchange Map

- Declared State-based Exchange
- Planning for Partnership Exchange
- Default to Federal Exchange

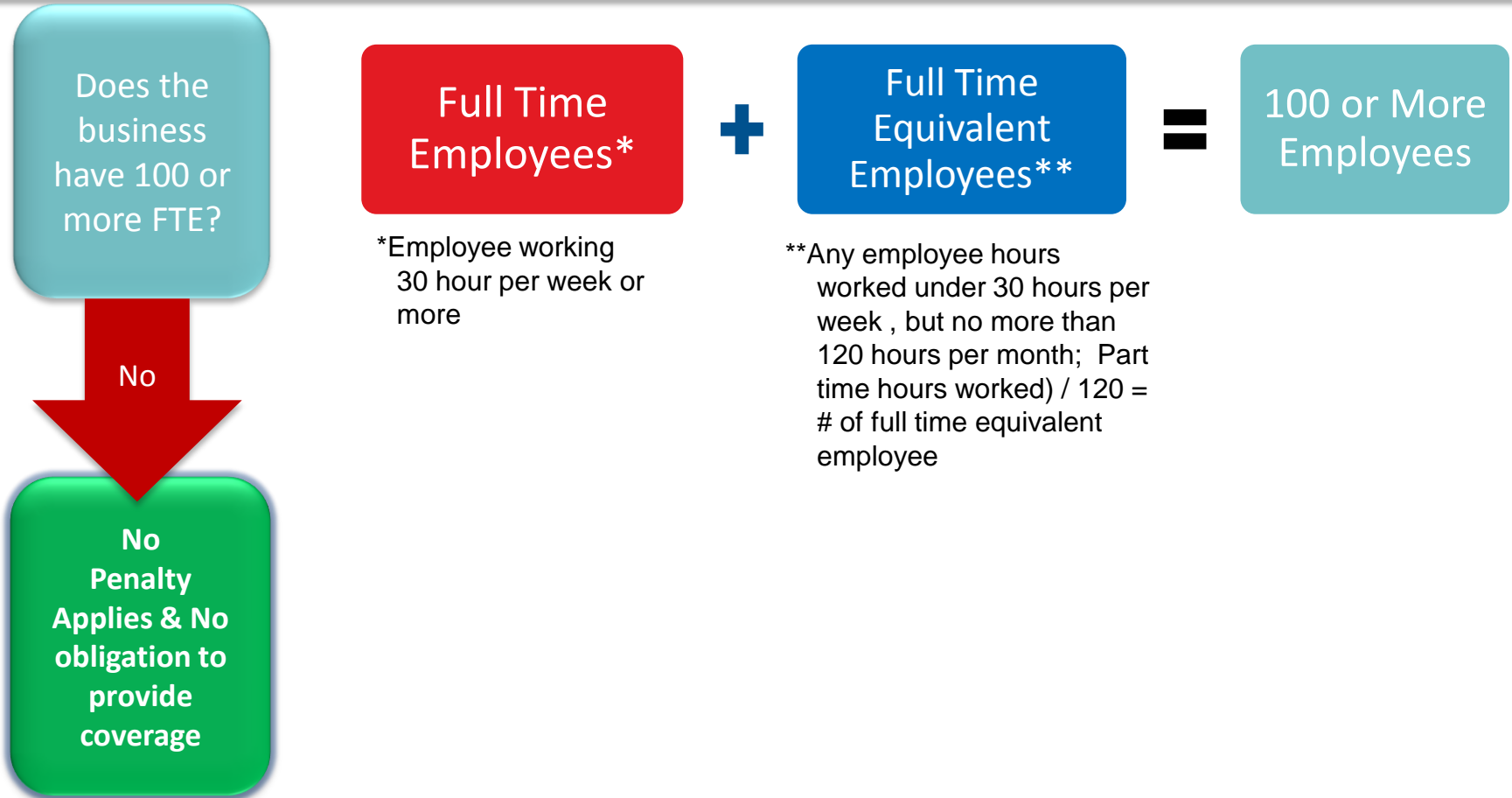
\* Utah plans to operate its own SHOP Exchange. The Dept. of Health and Human Services will operate the state's individual Exchange.

Updated: 6/10/13

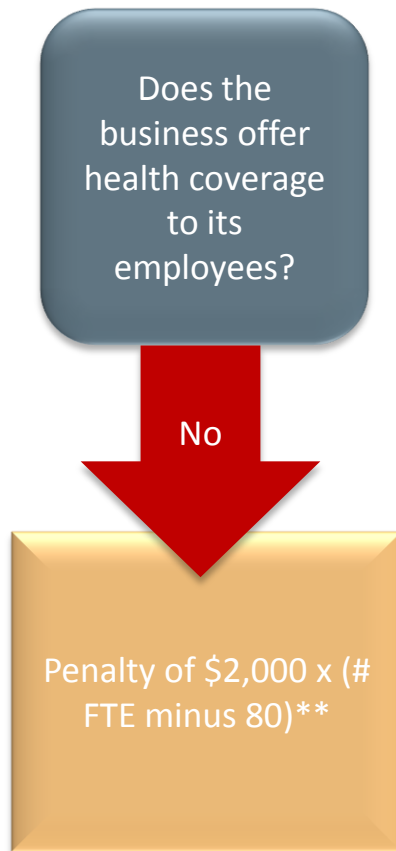


Map and key from: <http://obamacarefacts.com/state-health-insurance-exchange.php>

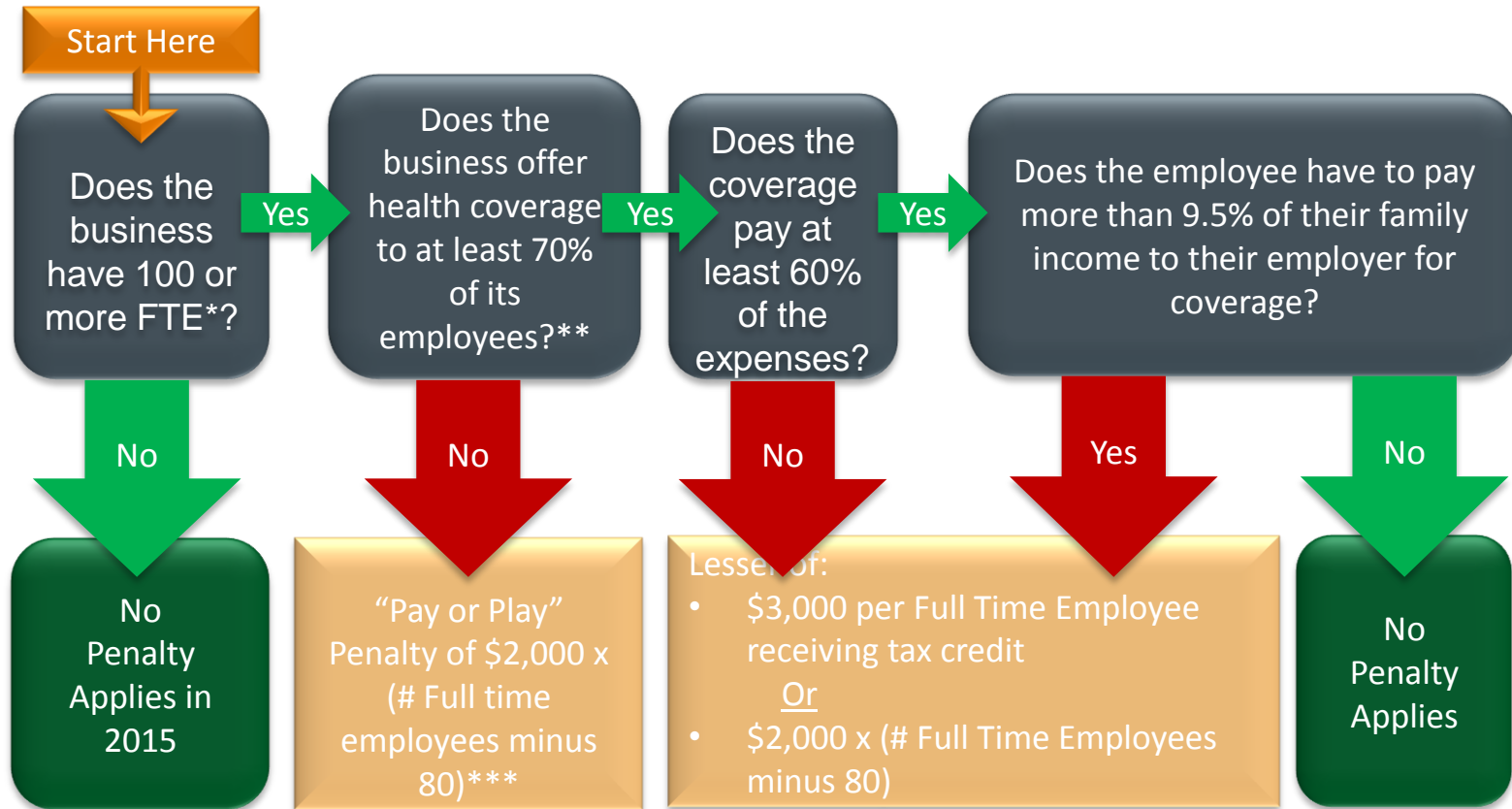
# How are Large Employers determined under ACA?



# Health Coverage Offerings by Employers



- Coverage for substantially all (70%) of full time employees
- Coverage for employee and dependents, which does not include spouse
- Minimum essential coverage:
  - Coverage for children until age of 26
  - Cannot exclude preexisting conditions
  - No lifetime limits on Essential Health Benefits
  - Limits on when a health insurance policy can be rescinded
  - Employers with more than 200 employees must automatically enroll employees in coverage
- Note: Penalty does not automatically apply if business does not offer coverage; an employee must enroll in exchange and receive tax credit



\*FTE = Full Time Employee + (total hours of part time workers during one month period/120)

\*\*Coverage must only be offered to those work more than 30 hours per week

\*\*\*Penalty only applies if employee obtains coverage through Health Insurance Exchange AND receives a premium tax credit because of household income

- Employer ABC has 1000 full time employees and does not provide healthcare coverage to anyone. John Smith, their employee, obtains a tax subsidy on the exchange. What is the tax imposed on ABC in 2015?
  - Formula:  $(\# \text{ of Full Time Employees} - 80) \times \$2000$
  - $(1000 - 80) \times \$2000 = \$1,840,000$  penalty tax
- Employer ABC has 500 full time (working more than 30 hours per week) and 500 part time workers. Coverage is offered to 70% of the full time workers.
  - No penalty tax applies.

- Coverage must be affordable. To meet those standards,
  - Cost of coverage cannot exceed 9.5% of employee's income
  - Coverage must cover 60% of anticipated expenses.
- Employer BCD offers coverage to its full time employees, but three employees are required to contribute more than 9.5% of their income towards the premium.
  - Formula: (# of employees required to contribute more than 9.5% of their income who receive a tax subsidy x \$3000)
  - $3 \times \$3000 = \$9000$  tax

- Employers with 50 to 99 employees will not incur a penalty if they do not provide health insurance in 2015 if:
  - They do not reduce employees hours or terminate employees to avoid their obligation to provide healthcare coverage
    - Employers may take these actions for bona fide business reasons.
  - They do not reduce or eliminate health care coverage currently in place
  - They certify the above to the IRS
- Employers with 100 or more employees need to offer coverage to 70% of their full time (more than 30 hours per week) workforce, instead of 95%



# Changes Announced for 2015 and 2016

- For 2015, the “pay or play” penalty assessed against employers who are required to and do not provide healthcare coverage, and, who have an employee who receives a subsidy on the exchange will be calculated as follows:
  - $(\# \text{ of Full Time Employees} - 80) \times \$2000$
- In 2016
  - Employers with 50 or more employees must offer coverage or face pay or play penalties
  - Employers with more than 50 Full Time Equivalent Employees must offer coverage to 95% of their full time workforce
  - The “pay or play” penalty for not providing healthcare will be calculated as follows:
    - $(\# \text{ of Full Time Employees} - 30) \times \$2000$



# PLUS PPACA Obligations -PCORI Fee

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- Patient Centered Outcomes Research Institute Fee
  - Fee designed to fund research on healthcare effectiveness
  - Payable by insurer of a fully insured plan or employer in a self funded plan.

Plan Year	Fee (per member per year)
2012	\$1
2013	\$2
2014	TBD

- PPACA creates a number of statutory penalties:
  - Section 1104 of the PPACA requires health plans to file a statement certifying data and information systems are in compliance with applicable standards. A \$1 per covered life penalty is imposed until certification is complete.
  - Section 1502 of the PPACA requires the reporting of coverage by individuals, employers and governmental units. A \$1000 per person penalty is imposed for the failure to file information regarding health insurance.
  - Section 1511 requires large employers (i.e. those with more than 200 employees) to automatically enroll their employees in health insurance. The penalty amount has not yet been determined.
  - Section 1514 of the PPACA requires large employers to report whether full time employees are offered minimum essential coverage. A \$100 per person penalty is imposed for the failure to file information regarding health insurance coverage.



## Additional PPACA Obligations - Cadillac Tax

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- Beginning in 2018, a 40% tax imposed on health plans whose costs exceed certain thresholds.
  - Individual Plan threshold: \$10,200
  - Family Plan threshold: \$27,500
- Tax applies on amounts in excess of thresholds.
- Tax Formula:
  - Cost of plan in excess of threshold x # of plans x .40)
- Example: If an employer offers 1000 individual plans that cost \$11,000, tax is
  - $(\$11,000 - \$10,200) \times 1000 \times .40 = \$320,000$  Cadillac Tax

# EXPOSURES

Potential D&O, EPL and Fiduciary exposures created by how employers manage implementation of PPACA.

# Directors and Officers Liability PPACA Exposures

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Increased health insurance/compliance costs and risk to private and non-profit organizations:

- Regulatory enforcement of PPACA-related employment and employee benefit statutes may negatively impact stock values triggering securities litigation
- Insolvencies of private companies and non-profit organizations and subsequent litigation by security holders, creditors, customers and non-profit stakeholders
- Decisions to cease operations and distribute assets due to increased cost
- Potential claims alleging breach of fiduciary duty/waste of corporate assets for failing to drop or dropping employee health benefits or becoming subject to a “Cadillac” tax
- Declines in stock values and subsequent litigation by security holders
- Providers, manufacturers and sellers of health care products, nursing services, pharmaceuticals and medical equipment may see declining reimbursement rates from Medicare/Medicaid
- Non-profit organizations that assist with the procurement of health coverage; reductions in grants and services due to additional compliance cost
- Exposure under ODL (Outside Directorship Liability) coverage extensions could become heightened

- Retaliation under Sec.18C of FLSA
  - Protects employees against retaliation for engaging in certain PPACA related protected activities
  - Employee needs to only show protected activity was a “contributing factor” to the adverse employment action
  - Employee may file private action and request *jury trial* if no final ruling issued within 210 days of filing complaint with OSHA
- Workforce Restructurings
  - Financial impact of PPACA may cause workforce restructurings leading to potential Wrongful Employment Practice claims
  - Affected employees may bring otherwise covered EPL claims.



# Fiduciary Liability PPACA Exposures

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- Retaliation under Section 510 of ERISA
  - Protects employees against retaliation for exercising rights entitled to under a benefit plan.
- Potential lawsuits by employees and/or independent contractors against employers who:
  - Reduce employees' hours to avoid obligation to provide healthcare coverage
  - Terminate employees to avoid obligation to provide healthcare coverage
  - Misclassify employees as independent contractors to avoid obligation to provide healthcare coverage
- Health plan participants alleging employers failed to provide PPACA mandated benefits
- Claims relating to communications concerning benefits available through healthcare exchanges
- PPACA Compliance Penalties



# Travelers Nielsen Survey Key Findings

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- Responses collected from over 800 corporate decision-makers to better gauge their understanding of healthcare reform
- Many employers are not aware of their PPACA obligations
  - What percentage of employers are somewhat, not very, or not at all familiar with their requirements under the PPACA.
    - 67%
  - What percentage had not commenced preparing for the PPACA as of March 2014?
    - 27%
  - The House Ways and Means, Education and the Workforce, and Energy and Commerce Committees estimates cost of complying with PPACA on employers and families has increased to how many man hours?
    - 127 million





# Travelers Nielsen Survey Key Findings

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- The PPACA creates additional exposures for employers.
  - 47% of respondents are not at all familiar with whistleblower protections given to employees complaining about violations.
    - Those that report being extremely familiar with the employer mandate are three times more likely to be worried about employee lawsuits.
  - 29% of employers intend to restructure their workforce or their benefits.
    - Of those, 19% are extremely or very likely to terminate employees.
    - Of those, 41% are extremely or very likely to reduce employees hours.



# Travelers Nielsen Survey Key Findings

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- 43% of employers do not think that fiduciary liability coverage can help offset litigation expenses
- 40% of employers do not think that D&O coverage can help offset PPACA litigation related expenses.
- 35% of employers do not think that EPL can help offset some litigation related expense.

