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Hidden Risks and Liabilities from Health Plans in Mergers and Acquisitions

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Health Plans- Applicable Statutes

- Medicare Secondary Payer
- ERISA- 510 etc.
 - Sanders v. Amerimed (S.D. Ohio 2014)
- COBRA
- USERRA & VBIA
- FMLA
- HIPAA Portability
- Tricare Secondary Payer

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Health Plans- Applicable Statutes

- WHCRA
- MNHPA
- MHPA & MHPAEA
- Medicare Prescription Drug Modernization and Improvement Act- Retiree Drug Subsidy
- HIPAA Privacy and Security and HITECH
- Patient Protection and Affordable Care Act ("ACA")

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Health Plans- Applicable Statutes

- GINA
- ADA
- ADA Amendments Act of 2008
- Title VII
- ADEA
- ARRA

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Potential Contractual Liabilities

- Single Employer Collective Bargaining Agreements
- Multiemployer Collective Bargaining Agreements - contractual withdrawal liability
- Promises outside of collective bargaining agreements generally not enforced due to reservation of right to amend, modify or terminate in plan and SPD
- The ERISA Plan wins- *Cigna v. Amara*- or does it? See *In re AMR Corp.*, 2014 Bank. LEXIS 1720 (April 17, 2014)

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Collectively Bargained Retiree Plans

- U.S. Supreme Court - 2014-2015 term will consider *M & G Polymers USA, LLC v. Tackett* (6th Cir. 2009) and whether the Yard-man Inference a presumption that collectively bargained retiree benefits are intended to be vested in the absence of CBA or plan language to the contrary
- 2 questions presented – only one being considered

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M & G Polymers USA , LLC v. Tackett

- Issue to be reviewed - Whether courts construing CBAs in LMRA cases should presume that silence concerning the duration of retiree health benefits means the parties intended for the benefits to be vested.
- Only looking at Labor and Management Relations Act (LMRA) not Railway Labor Act (RLA) so not all single employer collectively bargained plans will be addressed and not all issues will be addressed

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M & G Polymers USA , LLC v. Tackett

- Not reviewing - whether different rules of construction should apply when determining whether health benefits have vested in pure "ERISA" governed plans as opposed to plans under CBAs.
- Not looking at which language required for vesting.
- Not looking at state laws applicable to governmental entities and their retiree medical obligations which are outside ERISA and LMRA.

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Historical Retiree Medical Litigation

- Divided between CBA or no CBA
 - Further divided by Circuit
 - Further divided by language in CBA
- Results Vary by Circuit and CBA language

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Retiree Medical

- Even if plans exempt from ACA, large financial statement liability – FAS 106
- ACA exemption for retiree only plans used to contain costs only if plan qualifies on the first day of each plan year

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Retiree Medical

- ACA has led some employers to reconsider and look to moving retirees to defined contribution health plans with coverage purchased on a private exchange for coverage rather than traditional defined benefit retiree health plan
- Medicare supplemental policies are commonly being moved to the private exchanges

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Retiree Medical

- Using a DC approach to retiree medical and permitting the retiree to purchase their health coverage on a private exchange or marketplace may carry tax burdens for the employee unless the cost of coverage is funded out of a 401(h) account or a retiree only health reimbursement account ("HRA") so the HRA can be offered without violating the ACA
- Shifts risk to retirees
- Litigation is starting on these shifts under CBAs

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Retiree Medical

- DB to DC with CBA
- *Steelworkers v. Kelsey-Hayes Co.*, No. 13-1717, 2014 B.L. 111194, 199 LRRM 146, (6th Cir. 2014) finding replacing DB retiree medical with DC retiree medical with HRAs violated CBA Terms.
- *VanPamel v. TRW Vehicle Safety Systems, Inc.*, 723 F.3d 664 (6th Cir. 2014) retiree prescription drug coverage replaced with an HRA for CBU members. Retirees ordered to arbitrate their claim for a CBA violation as required under CBA

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Captive Insurers Used for Retiree Medical

- Rev. Rul. 2014-15 2014-22 I.R.B.
- PTEs – Coca Cola
 - Proposed 2010-11 retiree medical
 - 2013-06 retiree life

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VEBAs Turned Over to CBUs

- GM, Chrysler, et al – see outline
- PTEs necessary when funded with employer securities
- What happens when common stock or other securities contributed drop in value
- Review agreements creating VEBA re successor liabilities
- Review re continuing funding obligations

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Retiree Medical and ACA

- Early Retiree Reinsurance Program under ACA – maintenance of effort/contribution requirement
 - Impacts changes
- MPDMIA and Medicare Part D Retiree Drug Subsidy Requirements
 - Annual notice of creditable coverage
 - ACA ended employer's ability to obtain subsidy and take a tax deduction on same dollars spent on retiree prescription drugs- impacts liabilities

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Issues with Other Insured Benefits

- Watch to be certain employees on leaves, furloughs, lay offs or in waiting periods for disability benefits are not dropped if the insurer is changed - for benefits other than medical insurance - HIPAA outlawed actively at work in medical plans
- *Horn v. Cendant Operations, Inc.*, 69 Fed. Appx. 421 (10th Cir. 2003)
 - Failed to tell individual needed to return to active work for one day post acquisition to qualify for coverage under the new insurance policy

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COBRA Continuation Coverage

- Violations can result in penalties of up to \$100 per day per failure per qualified beneficiary for failing to deliver a notice or election to an affected qualified beneficiary
- To correct must put qualified beneficiary back in same place would have been in without violation
- Form 8928 permits an employer to admit violations, pay tax and start statute of limitations on excise tax for violations of COBRA, HIPAA and ACA

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COBRA Continuation Coverage

- Group Health Plan Must Provide COBRA continuation coverage if Employer had 20 or more employees on the average business day in the preceding plan year.
- The responsibility to offer to provide COBRA continuation coverage upon a qualifying event.

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COBRA Continuation Coverage

- M&A Qualified beneficiary
 - Last employment was with respect to assets sold
 - Need not be employed at corporate transaction

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COBRA Continuation Coverage

- If M&A agreement does not assign liability between seller and buyer, then general default rule applies
- If M&A agreement assigns liability for COBRA but parties do not follow the agreement, then general default rule applies

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COBRA Continuation Coverage

- Stock Sale, general rule—
- While entity changes ownership, employees of entity sold do not lose employment
- Employees do not lose coverage due to a loss of employment
- So no qualifying event

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COBRA Continuation Coverage

- Asset Sale- general rule
 - Employees' employment terminates
 - Qualifying event unless 1 of 2 exceptions apply
 - Buyer is successor and seller does not maintain any group health plan and the covered employee is employed by the buyer after the sale- buyer's plan picks up M&A QBs
 - Covered employee does not lose coverage under seller's group health plan after the sale- no loss of coverage no QE
 - QE Notice required by seller's plan if coverage is lost
 - No exception from notice for coverage by buyer

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COBRA Continuation Coverage

- Asset Sale- using the agreement terms
 - COBRA obligation does not transfer from seller for M&A QBs, however
 - If the seller does not provide any group health plan to any employees and if buyer continues the business in substantially the same manner without interruption or substantial change, then the buyer must provide COBRA to the M&A QBs with respect to the sale

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COBRA Continuation Coverage

- Stock Sale- Using the agreement's terms
- Normally this is not a QE on its own
- The Seller's COBRA obligation is for seller's employees not the M&A QBs as long as the seller has a group health plan.
- If the seller does not provide a group health plan to any employee, then the buying group has the obligation to provide CORA with respect to M&A QBs with respect to the sale.

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COBRA

- If asset sale and seller ceases to maintain group health plan in its controlled group, buyer's plan is successor and must offer COBRA to the M&A Qualified Beneficiaries
- Default rule applies if agreement is silent on COBRA liability
- Default rule applies if agreement allocates COBRA liability but responsible party does not follow agreement

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Health Plan Liabilities after ACA

- Early Retiree Reinsurance Programs
 - Claims in adjudication
 - Maintenance of Contribution requirement
- Numerous tax requirements with related penalties at different times
 - e.g. PCORI

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Health Plan Liabilities After ACA

- The complexity that provided flexibility also provides more ways to trip up.
- Different rules for different benefit packages
 - Grandfathered insured
 - Grandfathered self-insured
 - Non-grandfathered insured
 - Non-grandfathered self-insured
 - Excepted Benefit
 - Exempt Plan- status can vary by year
- See outline with chart of requirements- by status

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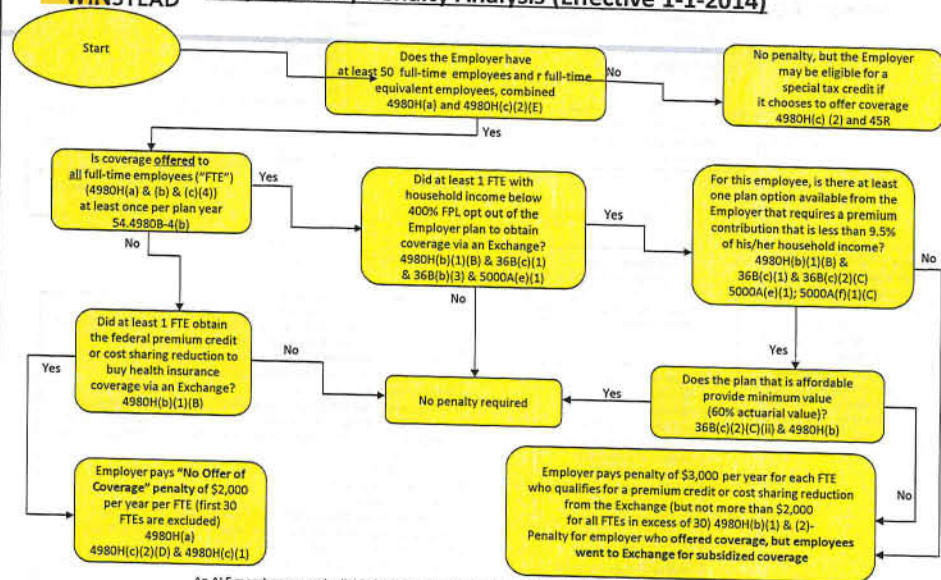
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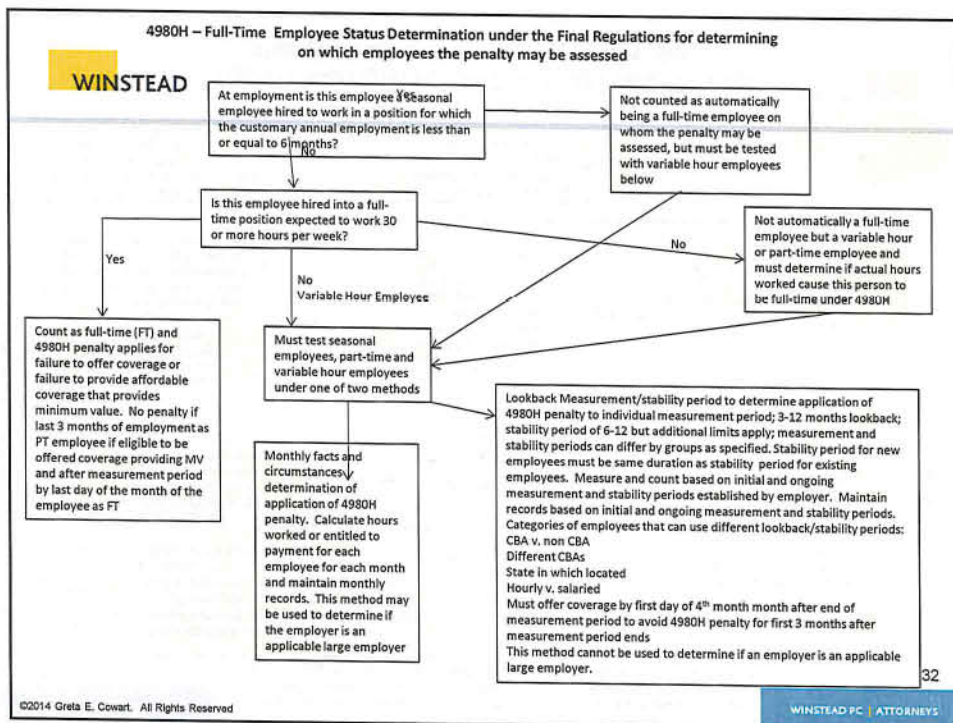
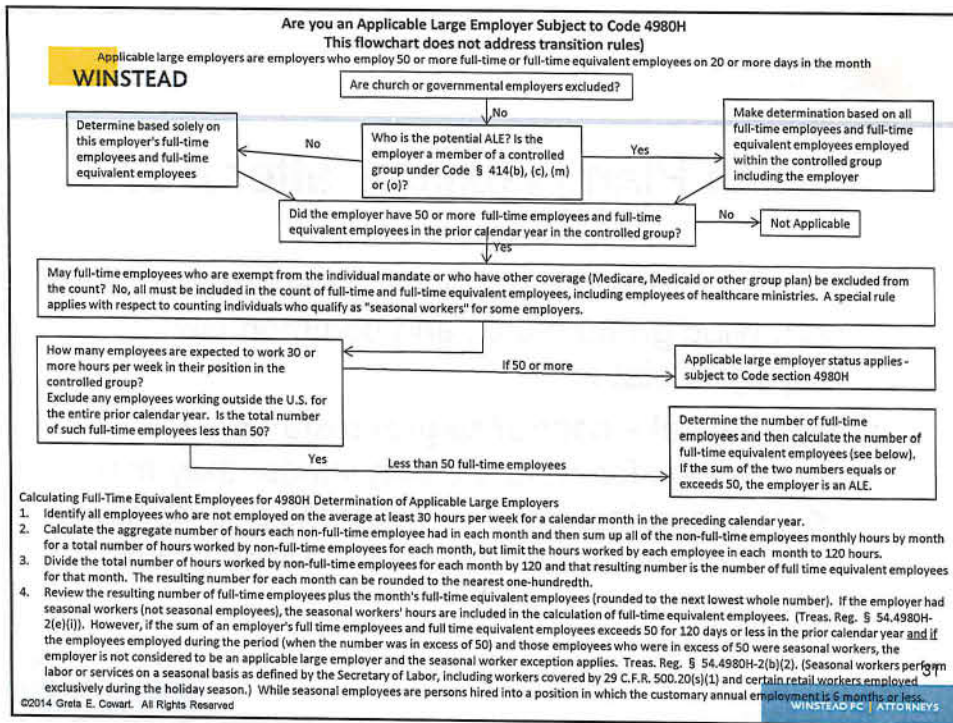
Health Plan Liabilities after ACA

- Shared Responsibility Liability depends on controlled group status and common law employee status
- Sun Capital – controlled group status implications for private equity funds- they may be engaged in a trade or business and not just investors and thus part of a controlled group and potentially an ALE

High Level Overview of Employer Shared Responsibility Penalty Analysis (Effective 1-1-2014)



An ALE member cannot be liable for both the penalty under 4980H(a) and under 4980H(b) in the same month. Treas. Reg. 54.4980H-5(d). This only addresses the shared responsibility penalty and does not address PCORIs, reinsurance fees, additional Medicare taxes or other costs that result from the decision.



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Health Plan Liabilities after ACA

- 2 employers each with exempt retiree only plans

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graph TD
    EA[Employer A] --- RPA[Retiree Plan A]
    EA --- RS[Retirees John and Sue]
    EB[Employer B] --- RPB[Retiree Plan B]
    EA --- M[Merger]
    EB --- M
    M --- NE[New Employer]
    NE --- RPA2[A Retiree Plan]
    NE --- RPB2[B Retiree Plan]
  
```

John and Sue retired from Employer A and participate in A's retiree medical plan
 John and Sue go to work for Employer B
 John and Sue will be current employees and retirees in the controlled group

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Issues after ACA

- Employers A & B merge into Newco
- Newco continues to maintain Retiree Plan A and Retiree Plan B
- John & Sue continue to be employed by Newco and to participate in the Retire Plan A
- Retiree Plan A covers John & Sue as retirees, but they are now also current employees of the combined entity
- Newco employs John and Sue as of the first day of the next plan year
- No transition rule on exempt status post M&A- potential violation by retiree plan of all of ACA mandated coverage requirements

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Health Plan Issues after ACA

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graph LR
    RPB[Retiree Plan B] --- Newco[Newco]
    Newco --- RPA[Retiree Plan A]
  
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Retiree Plan B

May still be exempt as long as fewer than 2 current employees of Newco are covered

Newco

Retiree Plan A ceases to be exempt on January 1 because it now covers 2 current employees

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Exempt Status Preservation for

- Need to review whether the employees of the other entity involved in the acquisition's employees include any retirees covered by your retiree medical plan and vice versa
 - Consider options for retirees' who are employees of the other entity (remember 510, ADEA and MSP)
 - Move to active coverage and address cost differential
- Loss of exempt status means no dollar limits on benefits and other mandates under ACA apply

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Strategies to Preserve Exempt Status

- Provide sufficient time between acquisition and end of plan year to address retirees hired by other entity
- Remember ERISA 510, ADEA, MSP etc

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Shared Responsibility

- No explicit provisions on M&A to date
- Analysis described for application to M&A is to use the analysis in the regulations for new entities
- Key question – is this entity an applicable large employer? (“ALE”)
 - Does the transaction bring a new entity into the ALE? Records to obtain and preserve
 - Does the transaction mean there are new hires to be monitored for full-time status?

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Shared Responsibility

- General real ALE status determined based on full-time employees in the preceding calendar year
- For a new employer, does the employer expect to employ 50 or more employees on more than 120 days in the calendar year?

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Shared Responsibility

- If an ALE acquires another business and brings it and its employees into the ALE's controlled group, then absent any transition relief the acquiring entity must start determining the full-time status under 4980H at the acquisition and make the offer of coverage or pay the penalty immediately
 - May be an incentive for transition services agreements with the seller continuing to employ and report through 12-31; however, shared responsibility employees are all common law employees

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Shared Responsibility

- If an ALE enters into a joint venture with another entity creating the new JV and the ALE does not own 80% or more of the JV, then the JV is in a separate controlled group from the ALE and the JV's status as an ALE is determined under the new entity rules depending upon whether it expects to employ 50 or more full-time employees in that year, if not it is not an ALE

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Shared Responsibility

- If an ALE buys the assets of another entity and combines that business within one of the entities in the ALE, the ALE Member taking over the operation of that business will be subject to the shared responsibility penalty on the employees acquired effective as of the date of the acquisition currently, unless transition relief is provided

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ACA Impact

- Violation of ACA benefit plan mandates results in penalties per person per violation per day \$36,500 per person per violation per year
- Violation of Shared Responsibility means additional taxes – requires planning and records to defend against imposition
- Both result in additional tax liabilities, unpaid taxes can become liens and impact the value of the transaction

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Questions?

Caveat: These slides do not constitute legal advice and no action should be taken based upon the contents of these slides because these are a very high level summary of the current rules and all circumstances must be considered when determining the application and best strategy for a particular employer or situation.

Thank you.

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