Labor & Employment

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Chair's Comments

Nicole Crawford

We hope you find this edition of our section newsletter helpful and thought-provoking. Thank you very much to our contributors and our editors, Jessica Leaven and Margaret Manos, who volunteered to chair the Newsletter Committee this year in service to our section. Those of us who volunteer for the section are working hard to make your membership valuable to your practice and the profession. In this vein, the section offered a half-day CLE, "Wandering the Affordable Care Act Labyrinth? What Every Lawyer Needs to Help Clients Navigate" on December 12, 2013 via webcast. The CLE covered the basics and a few advanced topics, including the whistleblower provisions. The CLE was well attended and was described as "fantastic." In Spring 2014, we plan to offer a live CLE on ethics in labor and employment mediation at the Bar Center. Finally, I would like to announce the following members of the section council who were elected or re-elected to three-year terms at our annual meeting during the North Carolina/South Carolina CLE: Mike Kornbluth (Durham), Andy Habenicht (Charlotte), Andy McVey (Wilmington), Grant Osborne (Asheville), and Mary Ann Leon (Greenville). I look forward to working with our entire council and committee volunteers this bar year. If you would like to become more involved in the section, we welcome suggestions and volunteers for the various committees (CLE, Membership, Newsletter). Just contact Julianne Dambro, assistant director of Sections & Divisions, at ***jdambro@ncbar.org***. Have a wonderful end of 2013!

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Social Media and Employment Law

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Social media is the generic term for websites and other applications that allow people to create and exchange information in a virtual community with others. Most of us are familiar with sites like Facebook, Twitter, and LinkedIn and those of you with teenagers probably know that Instagram has essentially replaced Facebook as the go-to social media application among that demographic. Social media is now much more than a method for teenagers to chat about their day. There has been an explosion of other applications such as Pinterest and SnapChat that allow for photograph or video exchange, blogging, podcasting, and chat communication. The technologies are not slowing down any time soon, and it's time for employment lawyers to join the social media revolution.

Employment lawyers need to pay attention to the data being shared on social media sites for a number of reasons. The most compelling reason is that there is a lot of data being exchanged by practically everyone on the planet. One researcher asserted that for every minute of the day 100,000 tweets are sent and 684,478 pieces of content are shared on Facebook. According to this same researcher, there are more devices connected to the Internet than there are people on Earth. Alarmingly, she notes that out of the 6 billion people on the planet, 4.8 billion have a mobile device while only 4.2 billion own a toothbrush. (100 Social Networking Statistics & Facts for 2012, January 4, 2013. ***http://www.creotivo.com/blog/infographic-100-social-networking-statistics-facts-for-2012***).

Second, we need to pay attention because of recent developments that affect how we should handle this information and how we should advise our clients. There are myriad issues surrounding social media, such as its use in internal workplace investigations, employer liability for employee postings, and uses by judges and jurors. For purposes of brevity, this article will address the following topics: (1) hiring and firing decisions on the basis of social media information, (2) recent legislation on "password protection" of individual social media content, and (3) discoverability of social media data.

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Social Media and Employment Law *(continued from page 1)*

Hiring and Firing Decisions on the Basis of Social Media Information

Hiring | Employers have increasingly used social media sites to recruit and scrutinize employee candidates. According to one 2012 social recruiting survey, 92% of U.S. companies now use social media and other social networks when looking for employees, up from 78% five years ago. (Jobvite's Social Recruiting Survey 2012. ***http://recruiting.jobvite.com/company/press-releases/2012/jobvite-social-recruiting¬survey-2012/***). If employers are using LinkedIn, Twitter, and Facebook for recruiting, it stands to reason that they are using social media to vet the applicants they have recruited. Given the vast amount of data that people post in the public domain, it is easy to see why employment decision-makers are taking a peek at online data. Unfortunately, it is also easy to see the potential liability for employers when they reject candidates who have posted information that identifies their membership in a protected class. Cautionary discussions of social media as a back door to employment discrimination appear in a number of law review articles, such as in Donald Carrington Davis, MySpace Isn't Your Space: Expanding the Fair Credit Reporting Act to Ensure Accountability and Fairness in Employer Searches of Online Social Networking Services, 16 Kan. J. L. & Pub. Pol'y 237 (2007).

In **Gaskell v. Univ. of Kentucky,** No. 09-244, 2010 WL 4867630, 2010 U.S. Dist. LEXIS 124572 (E.D. Ky. Nov. 23, 2010), the University's hiring committee vetted and highly ranked Gaskell for a scientist position with the University. One of the hiring committee members then conducted an internet search for information and found Gaskell's personal web site referencing his scientific and religious beliefs. After the entire hiring committee reviewed the article, the University declined to offer Gaskell the position. The court denied the University's motion for summary judgment on his Title VII claims of religious discrimination. Following this case, employment lawyers are likely to raise and encounter more arguments that an employer's discovery of social media that reveals an applicant's protected characteristic, in and of itself, creates a triable issue of fact as to motive for failing to hire.

Firing | What happens when an employer fires an employee for disparaging or insulting posts on a social media site? For example, can an employer terminate an employee who makes sarcastic remarks on his Facebook site mocking the poor quality of the food at the company's sales event? Can an employer terminate an employee for posting that, "My mom works for a law firm that specializes in labor law and, boy, would you be surprised by all the crap that's going on that's in violation"?

While our federal courts have not addressed these questions in a significant way, the National Labor Relations Board (NLRB) has weighed in assertively on employers' use of social media information in termination decisions. In several recent cases, the NLRB has carefully scrutinized the social media communication by employees to determine if the communication related to the "terms and conditions of employment" and, as such, constituted "concerted protected activity" under Section 7 of the National Labor Relations Act. 29 U.S.C. § 157.

In the above two examples, the NLRB found respectively that: (1) the postings about the food at the sales event were part of a course of protected, concerted conduct relating to employees' concerns over commissions (Karl Knauz Motors, Inc. d/b/a Knauz BMW, No. 13-CA-46452, 2011 WL 4499437, NLRB Div. of Judges, Sept. 28, 2011); and (2) that the postings about potential labor violations were a continuation of communication with supervisors about working late in an unsafe neighborhood and thus protected concerted activity. (Design Tech. Group LLC d/b/a Bettie Page Clothing, No. 20-CA-35511, 2012 WL 1496201, NLRB Div. of Judges, Apr. 27, 2012). As a result, the Board found that the employers in question violated the employees' rights by discharging them.

However, not all social media posts that contain complaints about the workplace constitute "concerted activity." For example, an employee who posted a message on his Facebook page that referenced the employer's tipping policy, in response to a question from a non-employee, did not engage in concerted activity with any other employees. JT's Porch Saloon & Eatery, Ltd., Case No. 13-CA-46689, 2011 WL 2960964 (Advice Mem. July 7, 2011). The Board found that

this employee was merely responding to a question from a non-employee about his own individual work experience, had never discussed it with other employees, and other employees never responded to the posting. On these facts, the posting was not enough to find concerted activity.

An employee of a Lacoste retail store in New York City was recently terminated because he posted his paycheck on Instagram along with a disparaging remark about how little he believes he earns. While the case has not yet resulted in litigation, it raises a very earnest question about whether that employee's photo of his paycheck and accompanying remarks might be considered a protected attempt to communicate with other employees about the terms and conditions of his employment. (***http://www.nydailynews.com/new-york/lacoste-employee-fired-posting-paycheck-instagram-article-1.1420631***).

A Fourth Circuit Case You Will Really "Like" | Last month, the Fourth Circuit reversed a grant of summary judgment against two former employees of the Hampton, Virginia Sheriff's office who were not reappointed to their positions after they "liked" the Sheriff's political opponent's Facebook campaign page. The court found that the act of "liking" the opponent's campaign page on Facebook amounted to constitutionally protected speech and symbolic expression under the First Amendment to the United States Constitution. The court engaged in a detailed analysis explaining why a Facebook "like" is tantamount to pure speech. Notably, the court opined that, "liking a political candidate's campaign page communicates the user's approval of the candidate and supports the campaign by associating the user with it. In this way, it is the Internet equivalent of displaying a political sign in one's front yard, which the Supreme Court has held is substantive speech." **Bland v. Roberts**, No. 12-1671, 2013 WL 5228033 (4th Cir. Sept. 18, 2013).

To Sum It Up | Recent case law developments around the interesting questions raised by social media use indicate that both employers and employees should use prudence in their posts, policies, and practices. While the law may not be evolving quite as quickly as social media technology and modern conceptions of privacy, employers should seek competent legal counsel to guide them in crafting sturdy social media policies to avoid the pitfalls and temptations that are inherent in making employment decisions based upon social media use. Employees and candidates for employment would be wise to secure their accounts, where possible, with maximum available privacy protections or otherwise to ensure that their social media use does not portray them as wholly unprofessional.

State and Federal Laws on Social Media Account "Password Protection" | After some well-publicized instances of employers demanding that applicants and employees divulge their usernames and passwords, there was a frenzy of legislative activity around this issue. Employers argued that they need access to an applicant's or employee's personal social media account to protect proprietary information or trade secrets or to prevent the employer from being exposed to legal liabilities. Most employee advocacy groups considered employer demands to provide employee social media data to be a significant invasion of privacy.

The privacy argument seems to be winning when one observes the trend among recent State laws. As of 2013, legislation has been introduced or is pending in at least 36 states. Eleven states have recently enacted "password protection" laws. (Arkansas, Colorado, Illinois, Michigan, Nevada, New Jersey, New Mexico, Oregon, Utah, Vermont and Washington). These laws generally prohibit employers from requesting username, password, or other means of accessing an employee's personal social media account and prohibit an employer from taking adverse employment action against an employee or applicant for failing to disclose this information.

During the last session of the North Carolina General Assembly, a bill restricting both academic institutions' and employers' ability to gain access to students' or employees' social media networks received bipartisan support in the House of Representatives. The bill, known as H.R. 846, or the Job and Education Privacy Act, now awaits action in a Senate committee when the legislature reconvenes next year.

If the General Assembly adopts the bill in its current iteration, it would mandate that an employer in North Carolina may not require or request that an employee or applicant disclose a username or password, require an employee or applicant to access an application to provide an employer with access to the account, monitor or track an employee's or applicant's personal electronic communication device, or compel an employee or applicant to add the employer to his or her personal social networking site profile or account. Furthermore, the bill makes it an unlawful act for an employer to fail or refuse to hire, discharge, discipline, penalize, retaliate, or threaten to do any of the foregoing because of an employee's refusal to disclose any protected information. (***http://www.ncleg.net/Sessions/2013/Bills/House/PDF/H846v1.pdf***)

However, this proposed law, similar to those laws already enacted or amended in other States, creates some exceptions for employers, such as the ability of a financial institution to conduct internal investigations and the ability of an employer to access accounts or devices that the employer supplies or pays for. Indeed, none of the State laws already enacted prohibit an employer from obtaining publicly available information broadcast through a social media account.

Discoverability of Social Media Information in Employment Litigation | As a practical matter, employment lawyers need to engage in informal social media discovery before any formal discovery requests are made. First, given that so many individuals and companies fail to properly protect their information with appropriate privacy settings, it makes sense to conduct as much "free" discovery on social media as possible. Second, discovery of relevant information in an individual's public portion of social media data bolsters the argument that relevant information is likely to be found in that individual's private social media data.

At its core, the analysis for discovery of an individual's private social media information is the same as in any other discovery dispute. That is, the court will deny overly broad "fishing expedition" requests and will grant requests that are narrowly tailored where the individual's privacy interests do not outweigh the probative value of the material. In **Schubart v. Horizon Wind Energy, LLC**, No. 11-cv-1446, 2012 WL 6155844, 2012 U.S. Dist. LEXIS 175063

(C.D. Ill. Dec. 11, 2012), the court held that the social media discovery request for all information related to a sex discrimination plaintiff's mental state was overly broad and should have had time limitations or required a connection to the events of the case. Similarly, in **Chauvin v. State Farm Mut. Auto. Ins. Co.**, No. 10-cv-11735, 2011 WL 2601023, 2011 U.S. Dist. LEXIS 121600 (E.D. Mich. Oct. 20, 2011), the court found there was no indication that granting access to a plaintiff's private Facebook account would be "reasonably calculated" to lead to discovery of admissible information. On the other hand, in **Anthony v. Atlantic Group, Inc.**, No. 8:09-cv-02383, 2012 WL 4009490, 2012 U.S. Dist. LEXIS 129639 (D.S.C. Sept. 12, 2012), the court ordered the plaintiffs to produce all of their social networking data related to plaintiffs' residences or receipt of certain travel and expense payments. In **EEOC v. Simply Storage Mgmt.**, 270 F.R.D. 430, 435, 2010 WL 3446105 (S.D. Ind. 2010), the court ordered the EEOC to produce social media communications relevant to the plaintiffs' emotional state in part because of the plaintiffs' allegations of severe emotional distress.

The Near-Term Effects of Windsor: FMLA and ERISA Implications

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On June 26, 2013, the Supreme Court of the United States, in **United States v. Windsor** [***http://www.supremecourt.gov/opinions/12pdf/12-307_6j37.pdf***], 570 U.S. __, 133 S. Ct. 2675 (2013), struck down Section 3 of the federal Defense of Marriage Act of 1996 (DOMA) on due process and equal protection grounds. In particular, the court ruled that Section 3, which strictly defines marriage as the legal union between two individuals of the opposite sex for all federal government purposes, is unconstitutional under the Fifth Amendment, because it would effectively prohibit a same-sex couple who is legally married in their state of residence from enjoying the same federal benefits that a similarly situated opposite-sex couple in the same state would enjoy.

The court noted that its holding in **Windsor** only applies to "lawful marriages," or, in other words, same-sex marriages that are legally recognized by a state, as opposed to civil unions or domestic partnerships. The distinction is critical for employees who united under civil union laws or have registered (such as, via affidavit) with their employers as domestic partners. To date, same-sex marriage is legal in fourteen states – California, Connecticut, Delaware, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, New York, Rhode Island, Vermont, and Washington – and the District of Columbia.

In response to the **Windsor** decision, the President directed the Attorney General to work with other members of the Cabinet to review all relevant federal statutes to ensure the Supreme Court's decision, including its implications for federal benefits and obligations, is implemented swiftly and smoothly.

Federal Agency Guidance…So Far

Internal Revenue Service | In an effort to implement the **Windsor** decision, on Aug. 29, 2013 the Internal Revenue Service (IRS) issued Revenue Ruling 2013-17, articulating a number of federal tax principles related to the downfall of DOMA. First, for federal tax purposes, the terms "marriage," "spouse," "husband," and "wife" should be broadly interpreted to include individuals married to a person of the same sex, if the individuals are lawfully married under any state's law. Second, the IRS has adopted a general rule recognizing a marriage between individuals of the same sex that was validly entered into in a state whose laws authorize same-sex marriage, even if the married couple is living in a state that does not recognize the validity of same-sex marriages. Third, and finally, the terms "marriage," "spouse, "husband," and "wife" do not include individuals – whether of the same sex or opposite sex – who have entered into a registered domestic partnership, civil union, or other similar formal relationship recognized under state law that is not denominated as a marriage under the laws of that state.

The holdings of the IRS Ruling are to be applied to employers as of Sept. 16, 2013 (the effective date of the Ruling), meaning from that date forward all qualified employee benefit plans must have begun treating same-sex spouses the same as opposite-sex spouses for all federal tax purposes (as described above). The Ruling applies retroactively to employees, who are permitted to file original, amended, or adjusted federal tax returns, or claims for a credit or refund for any overpayment of tax from a current or previous tax year resulting from the Ruling, provided that the three-year limitations period for filing any such claim has not expired.

Employers, in contrast, cannot make claims for refunds of overwithheld income tax for prior years (e.g., where the employer provided health coverage for an employee's same-sex spouse and included the value of that coverage in the employee's gross income or where the employer sponsored a cafeteria plan that allowed employees to pay premiums for health coverage, but the particular employee was required to pay for health coverage for a same-sex spouse on an after-tax basis). Employers may, however, make adjustments for income tax withholding that was over-withheld from an employee in the current year, so long as the employer has repaid or reimbursed the employee for the over-withheld income tax before the end of the calendar year. The IRS has stated that it will issue future guidance, which will (a) set forth a special administrative procedure that employers can use in making any necessary adjustments, (b) address retroactive application of the **Windsor**

decision to other employee benefits and employee benefit plans and arrangements, and (c) provide sufficient time for any necessary plan amendments or corrections. IRS Notice 2013-61 sets forth the optional special administrative procedures for employers to make adjustments or claims for refund or credits.

Department of Labor | Also in August of this year, the Department of Labor, through its Wage and Hour Division, issued Fact Sheet #28F, which clarified the effect of the **Windsor** decision on the Family and Medical Leave Act (FMLA). Notably, unlike the IRS principles, which recognize a legally entered same-sex marriage even if the couple's current state of residence does not recognize the validity of same-sex marriages, the Department of Labor makes clear in Fact Sheet #28F that, for purposes of FMLA administration, the term "spouse" should be interpreted consistent with the marriage laws of the state where the employee resides. In other words, an employee in a same-sex marriage is now entitled to equal leave benefits under FMLA, but only if the state in which he or she resides recognizes the marriage as valid.

On Sept. 18, 2013, the Department of Labor issued guidance relating to the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, the Department of Labor announced that, in general, the terms "spouse" and "marriage" in Title 1 of ERISA and in related department regulations should be read to include same-sex couples who were legally married in any state or foreign jurisdiction that recognizes such marriages, regardless of the couple's current state of residence.

Implications for Employee Benefit Plans | In light of **Windsor** and the resulting guidance issued by various federal government agencies, an employee in a same-sex marriage should contact his or her human resources departments and request to update their employment records, in particular because surviving spouse benefits are now available to same-sex couples (see below under "Qualified Retirement Plans"). Employers should carefully review their employee benefit plan design and documents to ensure compliance. The current state of the law post-**Windsor** underscores the following considerations to be taken into account by those who are responsible for administering employee benefit plans:

- ***Qualified Retirement Plans:*** The new, more inclusive definition of a "spouse," for purposes of qualified plan distribution options, now includes same-sex spouses. Accordingly, plan administrators must be cognizant of the applicable rules for spousal consent, automatic spousal benefits, spousal survivor rights, default beneficiaries, hardship withdrawals, rollovers, and required minimum distributions and must apply those rules equally to same-sex spouses.

- ***HIPAA:*** Special enrollment rules for new spouses now apply equally to a newly acquired spouse of the same sex as the employee.

- ***Flexible Spending Accounts (FSAs):*** For purposes of determining whether expenses are reimbursable, health FSAs and dependent care FSAs are bound by the definition of "spouse," which includes same-sex spouses. For health FSAs, qualified medical expenses of a same-sex spouse will be reimbursable without imputation of the expense as income to the employee. For dependent FSAs, care for a same-sex spouse should be reimbursable without imputation, so long as the spouse can properly be categorized as the employee's dependent.

- ***Health Savings Accounts (HSAs):*** The previously existing annual contribution limits are now applicable to same-sex married couples.

- ***COBRA:*** Same-sex spouses can be considered a "qualified beneficiary" and, therefore, must be provided with the same formal COBRA notices and have the same rights as opposite-sex spouses to choose to continue their group health plan coverage after loss of coverage resulting from a qualifying event.

- ***FMLA:*** In states that recognize same-sex marriages, in addition to recognizing leave for a same-sex spouse with a serious health condition, it is important to be familiar with how the Department of Labor defines "son or daughter," for purposes of FMLA leave, and to apply that definition equally to the children of the same-sex spouse of an employee, whether the employee has adopted the children or not.

- ***Gross-Ups:*** Because same-sex spouses are now treated the same as opposite-sex spouses for federal tax purposes, employers may no longer need to provide employees with gross-up payments to account for the additional taxes incurred as a result of the employees' same-sex spouses' coverage being treated as taxable under DOMA.

- ***Health Plan Premiums:*** An employee in a same-sex marriage is now allowed to pay his or her same-sex spouse's (and the spouse's children who are "qualifying children") medical, dental, and vision coverage on a pre-tax basis.

Finally, employers should watch for and ensure compliance with any future guidance issued by government agencies in the coming months.

Affordable Care Act Update

Jeremy A. Stephenson | **Shareholder in the Charlotte office of the McNair Law Firm, P.A.**

The Patient Protection and Affordable Care Act ("ACA") withstood a Supreme Court challenge, a Presidential election, a government shutdown, and technical website glitches to the federal healthcare exchange website, HealthCare.gov. Having withstood these challenges, now is an appropriate time to review the ACA's requirements for 2013 and 2014.

The ACA involves complex tax issues, and new regulations and opinion letters are regularly being issued by the various federal agencies involved. Some litigation on the ACA still remains pending. While this article faces such limitations, all employment law practitioners in North Carolina are encouraged to understand basic information about the ACA in order to better serve their clients.

Requirements for 2013 | In 2013, employers must provide all employees with a notice about coverage options available through the Health Insurance Marketplace (the Exchanges). The ACA added a new section to the Fair Labor Standards Act (FLSA) requiring employers to notify employees of their health coverage options through the Exchanges. All employers subject to the FLSA need to provide all employees with a written notice informing them about the existence of the Exchanges and the employer's cost-sharing plans. New employees must be given the notice within 14 days of hire. Notice must go to all employees, not just those eligible for employer-sponsored coverage. The United States Department of Labor (DOL) has provided two model notice forms – one for employers who offer employer-sponsored health insurance to some or all of their employees, and one for employers who do not offer coverage. The model notices are available through the DOL's website (***http://www.dol.gov/ebsa/healthreform/***). The original notice deadline of March 1, 2013, was delayed to Oct. 1, 2013. In September of 2013, the DOL's Employee Benefits Security Administration (ESBA) issued its 16th set of FAQs on the ACA's implementation (***http://www.dol.gov/ebsa/faqs/faq-aca16.html***).

If an employer plans to pay for less than 60% of the total cost of the health plans it offers to workers, then its employees may be eligible for a premium tax credit to purchase a qualified health plan through an Exchange. Per the recent FAQs, an employer will have fulfilled its notice obligation if another party, such as an insurer or third-party administrator, provides "timely and complete notice." For an employer to be relieved of its notice obligation, the third party must provide notice to all employees.

Another notable point is that the ACA stipulates that a group health plan cannot apply any waiting period that exceeds 90 days.

Employers must report the value of the group health insurance plan on the W-2s of its employees for the 2013 tax year. In 2012, this was required of employers of more than 250 employees. The aggregate cost of applicable employer-sponsored coverage is what is reported. The amount reported is not taxable income. The purpose is to provide useful and comparable information to employees on the cost of their coverage. Aggregate reportable cost equals the employer cost plus employee cost. This includes major medical coverage, employer Flexible Spending Account (FSA) contributions beyond the employee deferral, hospital indemnity or specified illness coverage, domestic partner coverage, and other coverage if it is included in COBRA premium like wellness programs, EAP's, or on-site medical services.

Employers must provide a summary of employee benefits and coverage using a new standard format. This Summary of Benefits and Coverage (SBC) must be provided beginning the first day of the first enrollment period that begins on or after Sept. 23, 2012. The SBC requirement does not replace the Summary Plan Description (SPD) requirement. The SBC must include a statement regarding the plan's share of cost, which must be at least 60% of the total cost of the benefits. On April 23, 2013, the federal government issued a revised model SBC and corresponding guidance that applies to the second year requirement (i.e., coverage beginning on or after Sept. 1, 2014 and prior to Sept. 1, 2015). *See* FAQs part 14 (***http://www.dol.gov/ebsa/faqs/faq-aca14.html***).

Employers must amend their plans to note the change in Internal Revenue Code (IRC) 125 Plan limits and confirm that new Medicare tax changes are made. Effective Jan. 1, 2013, an employee may only contribute up to $2,500 pre-tax to a health FSA, indexed for inflation. Open enrollment communications and election forms must be amended by the end of 2013. Also effective Jan. 1, 2013, employees earning over $200,000 (or $250,000 for married filing jointly) are taxed an additional 0.9%. Employers need to confirm that their payroll department or service provider has taken into account the employer's wage withholding and reporting obligations regarding the additional tax.

Looking ahead to 2014 | Beginning in 2014, unless extended, will be the individual mandate requiring individuals to be insured or face a penalty. It should be noted that the individual mandate, and therefore individual penalty, does not apply to undocumented immigrants, the incarcerated, members of Indian tribes, those with family incomes less than $10,000 for an individual or $20,000 for a family, or if the individual is paying more than 8% of income for health insurance.

If an individual is insured through Medicare, Medicaid, the Children's Health Insurance Program (CHIP), TRICARE (for service members, families, and veterans), a plan offered by an employer, individual insurance bought by the employee at least at the "Bronze" level (the lowest of the four main tiers of coverage that will be available), or a grandfathered plan from before the ACA was enacted, then the requirement to have health insurance is satisfied and there will be no penalty.

In 2014, the individual penalty is $95 per adult and $47.50 per child — up to $285 per family or 1% of family income, whichever is greater. In 2015, this penalty increases to $326 per adult and $162.50 per child — up to $975 for a family or 2% of family

income, whichever is greater. In 2016, the penalty increases still further to $695 per adult and $347.50 per child — up to $2,085 per family or 2.5% of family income, whichever is greater.

When calculating what counts as "income" under the ACA, total income is included in excess of the filing threshold ($10,000 for an individual and $20,000 for a family in 2013). The penalty is pro-rated by the number of months without coverage, although there is no penalty for a single gap in coverage of less than three months in a year. The penalty cannot be greater than the national average premium for bronze coverage in an exchange. After 2016, penalty amounts are increased annually by cost of living.

Premiums for health insurance purchased through the Exchanges would vary by age. The Congressional Budget Office estimates that the national average annual premium in an exchange in 2016 would be $4,500-$5,000 for an individual and $12,000-$12,500 for a family for "bronze" coverage (again, the lowest of the four tiers of coverage that will be available).

In 2012, employees paid $951 on average towards the cost of individual coverage in an employer plan and $4,316 for a family of four. The Kaiser Family Foundation on its web site has an excellent subsidy calculator illustrating premiums and tax credits.

Summary of employer obligations | To be clear, employers are not required to provide health insurance to employees. The ACA requires that a large employer offer either affordable, minimum essential coverage to full-time employees or pay a penalty tax. A "large employer" is an employer with 50 or more full-time or full-time equivalent employees. "Full-time employee" is defined as an employee who works an average of 30 hours per week. "Full-time equivalent employees" is the aggregate of the number of hours worked by all non-full-time employees divided by 120 hours.

Large employers who do not offer coverage to their full-time employees will be subject to an annual tax of $2,000 per employee if at least one full-time employee receives premium assistance tax credit at the exchange. There is an exemption for the first 30 full-time employees. If a large employer offers qualified coverage, but the employee share of the premium exceeds 9.5% of the employee's household income, then the employer faces an annual tax of $3,000 per full-time employee eligible for and receiving tax credits on the Exchanges.

Effective Oct. 1, 2013, employers must be prepared, as open enrollment began in the Exchanges. On July 2, 2013, the United States Department of Treasury announced that the employer mandate provision has been delayed until 2015. This means that large employers will have until Jan. 1, 2015 to comply with the mandate. The delay is the Administration's response to concerns about the complexity of the employer reporting requirements, as well as the need for more time for effective implementation. The additional year will allow the Administration to consider ways to simplify reporting requirements. The additional year also provides time for the adaption of health coverage and reporting systems. The announcement does not affect the individual mandate, the individual health insurance tax subsidies, or the state or federal marketplaces – all scheduled to take effect on Jan. 1, 2014.

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