

Texas School Districts and the Affordable Care Act

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The Patient Protection and Affordable Care Act and the Health Care Education and Reconciliation Act comprise what is known as the Affordable Care Act or ACA.¹ This paper outlines how the ACA could affect Texas school districts.

Overview of the ACA

The ACA imposes new duties on health care providers, health insurance plans, employers, and employees. In addition, the ACA provides for the creation “American Health Benefit Exchanges” by 2014. The exchanges will be created by the individual states or, in states that do not create exchanges, by the United States Secretary of Health and Human Services. An exchange is not an insurer, but will provide individuals with access to insurers’ plans in a comparable way. Lawful residents of a state who are not incarcerated will be eligible to enroll in an exchange plan. Lower income persons who enroll in the exchanges may qualify for a tax credit toward their premium costs and a subsidy for their cost sharing.

Health Insurance in Texas School Districts

Before delving into the ACA, it is important to understand the basics on health insurance for employees in Texas school districts.

Mandatory benefits: State law mandates that Texas school districts provide health benefits to employees.² Unless an exemption applies, a district with 500 or fewer employees is required to participate in TRS-ActiveCare, the group health insurance program operated by the Texas Teacher Retirement System (TRS) for active employees.³ A district with more than 500 employees may elect to participate in TRS-ActiveCare, or may provide comparable coverage through other means.⁴

Mandatory contribution levels: State law also mandates minimum contribution levels. Each district must contribute at least \$150 per month (\$1,800 per year) towards the monthly insurance premiums for each participating employee who is a member of the TRS retirement program.⁵ In addition, the state currently pays \$75 per month for each qualifying employee.⁶ Thus, the combined state and district contributions to employee health insurance premiums are at least \$225 per month (\$2,700 per year).

¹ Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2009) (as amended by the Health Care and Education Reconciliation Act, Pub. L. No. 111-152, 124 Stat. 1029 (2010)).

² Tex. Educ. Code § 22.004.

³ Tex. Educ. Code § 22.004; Tex. Ins. Code § 1579.151.

⁴ Tex. Ins. Code § 1579.152.

⁵ Tex. Ins. Code § 1581.052(a).

⁶ Tex. Ins. Code 1579, Subch. F; Teacher Retirement System, *Contributions to TRS-ActiveCare*, Feb. 18, 2011, available at www.trs.state.tx.us/TRS_activecare/documents/contributions_to_trsactivecare.pdf.

TRS-ActiveCare: Currently, over 900 independent school districts—about 90% of the districts in the state—participate in TRS-ActiveCare.⁷ TRS sets the enrollment criteria for these plans. A person is employee is eligible to enroll if the person is employed by a district that participates in TRS-ActiveCare and:⁸

- The person is an active contributing member of the TRS retirement program; or
- The person is employed by the participating district for 10 or more regularly scheduled hours each week

TRS also determines the premiums: districts do not have direct control over the premiums for the TRS-ActiveCare plans.

Who is the plan sponsor? School districts that participate in TRS-ActiveCare are *employers*, but they probably are not plan sponsors. The term *plan sponsor* is generally understood to mean an entity that sets up a healthcare plan for the benefit of the entity's employees. Plan sponsors determine which employees can participate in the plan and what the plan will cover, and manage payment for coverage. Texas school districts that participate in TRS-ActiveCare do not set up the plans. Rather, the plans are controlled by TRS, as trustee of the state-established TRS-ActiveCare program. Similarly, state law, not the individual districts, determines who is eligible to participate. Finally, although districts forward premium payments to TRS, TRS is responsible for paying the agency's contract with Blue Cross, Blue Shield.

The distinction between plan sponsor and employer is important for Texas school districts. The legal responsibilities that the ACA confers on a plan sponsor will generally fall to TRS, whereas the responsibilities conferred on employers will generally fall to districts. Thus, for those districts that participate in TRS-ActiveCare, TRS will manage the plan changes required by the ACA. TRS has already amended its health plans to comply with the ACA, including coverage of dependents to age 26, coverage of pre-existing conditions for children under 19, no-cost preventive care, and a prohibition on lifetime coverage limits.⁹

About ten percent of Texas districts do not participate in TRS-ActiveCare. Districts that do not participate in TRS-ActiveCare should work with their third-party administrators and benefits counsel to ensure that their plans are in compliance with the ACA.

Grandfather status: Some of the changes mandated by the ACA are required for all plans. Others apply only to plans that are not grandfathered. In the simplest terms, a *grandfathered plan* is one that was in existence when the ACA was adopted on March 23, 2010.¹⁰ A plan loses

⁷ TRS-ActiveCare Participating Entities - 2012-2013, *available at* www.trs.state.tx.us/TRS_activecare/documents/trs_activecare_participation_list.pdf.

⁸ TRS-ActiveCare Enrollment Guide: 2012-2013 Health Plans, available at www.bcbstx.com/trs/pdf/1213_trs_enroll.pdf.

⁹ Hinda Chaikind et al., Cong. Research Serv., R 40942, Private Health Insurance Provisions in PPACA (P.L. 111-148) 1 (2010). *See* Teacher Retirement System, *TRS-ActiveCare 2012-2013 Plan Highlights*, available at www.trs.state.tx.us/TRS_activecare/documents/plan_highlights_fy13.pdf (detailing preventive care covered at no-cost).

¹⁰ Hinda Chaikind et al., Cong. Research Serv., R 40942, Private Health Insurance Provisions in PPACA (P.L. 111-148) 5 (2010).

its grandfather status if material changes are made to the plan structure or premiums.¹¹ Due to changes in the structure of its plans and to premium increases, TRS-ActiveCare lost grandfather status as of the 2011-12 plan year. Loss of grandfather status has implications for employer responsibilities. As discussed below, an employer that participates in a plan that is not grandfathered may be subject to new nondiscrimination rules.

TRS-ActiveCare plan year: The TRS-ActiveCare plan year runs from September 1 to August 31.¹² Thus, ACA requirements that apply on a plan year basis will take effect for TRS-ActiveCare districts in September 1 of the applicable year. For example, some ACA requirements applied to “plan years beginning on or after six months” from the date of enactment.¹³ The ACA was enacted on March 23, 2010, and six months after that was September 23, 2010. TRS-ActiveCare’s first plan year beginning after September 23, 2010, was September 1, 2011, a year and a half after the law took effect.

Individual Mandate

IT is helpful or districts to understand the individual mandate because the mandate may drive employee behaviors with respect to enrollment in health insurance. The ACA requires individuals to maintain minimum health insurance coverage for themselves and their dependents.¹⁴ Unless an individual is exempt, the individual will have to pay a penalty for every month that the individual fails to maintain health insurance coverage. This requirement takes effect January 1, 2014.

Effective date: January 1, 2014

Individuals may be exempt from the mandate if they cannot afford coverage or if they fall into certain categories. Those who will be exempt on affordability grounds include:

- Individuals whom the Secretary of Health and Human Services has determined to have suffered hardships with respect to the capability to obtain coverage under a qualified health plan
- Individuals (and their dependents) whose household income is less than the filing threshold for federal income taxes for the applicable tax year
- Individuals whose required contribution for self-only coverage for a calendar year exceeds 8% of household income.¹⁵

¹¹ See Interim Final Rules for Group Health Plans and Health Insurance Coverage Relating to Status as a Grandfathered Health Plan Under the Patient Protection and Affordable Care Act, 75 Fed. Reg. 34538-570 (June 17, 2010).

¹² Teacher Retirement System, *Enrollment Guide: 2012-2013 Health Plans*, available at www.bcbstx.com/trs/pdf/1213_trs_enroll.pdf.

¹³ One example is the requirement to provide coverage for preventive health services. Hinda Chaikind et al., Cong. Research Serv., R 40942, Private Health Insurance Provisions in PPACA (P.L. 111-148) 34 (2010).

¹⁴ Hinda Chaikind et al., Cong. Research Serv., R 40942, Private Health Insurance Provisions in PPACA (P.L. 111-148) 6 (2010); Hinda Chaikind et al., Cong. Research Serv., R 41331, Individual Mandate and Related Information Requirements under PPACA (2010).

¹⁵ Hinda Chaikind et al., Cong. Research Serv., R 41331, Individual Mandate and Related Information Requirements under PPACA, 3 (2010).

Categories of individuals who will be exempt from the individual mandate include:¹⁶

- Those with qualifying religious exemptions
- Those in a health care sharing ministry
- Individuals not lawfully present in the United States
- Incarcerated individuals
- Those without coverage for less than three months
- Members of Indian tribes
- Those residing outside of the United States
- Bona fide residents of any possession of the United States.

An individual who is not exempt must pay an annual penalty. The penalty will be the greater of:

- A percentage of the individual's "applicable income."¹⁷ The percentage will be 1.0% in 2014, 2.0% in 2015, and 2.5% thereafter; or
- A flat dollar amount for each taxpayer and any dependents, with the total family penalty capped at 300% of the flat dollar amount. The flat amount for any dependent under the age of 18 is one-half the stated amount. This amount is phased in at \$95 in 2014, \$325 in 2015, and \$695 in 2016, then adjusted for inflation.

The penalty for noncompliance cannot exceed the national average premium for bronze level-qualified health plans offered through state insurance exchanges (for the relevant family size).¹⁸ Any penalty that taxpayers are required to pay must be included in their tax returns for the taxable year.¹⁹

Example: Individual Mandate

A married couple with two children, ages 15 and 16, makes a combined total of \$40,000 per year. The filing threshold amount plus the standard deduction amount for this couple for the taxable year is \$18,700. In 2014, the couple fails to obtain health insurance for themselves or for their children. The couple is subject to an annual penalty of the greater of:

- Percentage of income: $\$40,000 - \$18,700 = \$21,300$. $21,300 \times 1\% = \$213$; or

¹⁶ Hinda Chaikind et al., Cong. Research Serv., R 41331, Individual Mandate and Related Information Requirements under PPACA, 4 (2010).

¹⁷ "Applicable income" is the amount by which an individual's household income exceeds the applicable filing threshold for the applicable tax year. The filing threshold is the personal exemption amount plus the standard deduction amount.

¹⁸ Hinda Chaikind et al., Cong. Research Serv., R 41331, Individual Mandate and Related Information Requirements under PPACA, 2 (2010).

¹⁹ Hinda Chaikind et al., Cong. Research Serv., R 41331, Individual Mandate and Related Information Requirements under PPACA, 2 (2010).

- Flat dollar amount: $[2 \times \$95 \text{ (annual penalty for adults)}] + \$95 \text{ [total annual penalty for two children under 18]} = \285 .

In 2015, these amounts will increase to \$426 (percentage) and \$975 (flat amount), respectively. By 2016, the penalty amounts will be \$532.50 (percentage) and \$2,085 (flat amount), respectively.

Employer Shared Responsibility

Large employers—as defined by the ACA—will be subject to new requirements, including automatic enrollment and potential assessments for failing to offer health insurance coverage to all full-time employees, or for offering insurance that is not affordable or does not provide minimum value. These requirements are discussed below.

Large employer: A district is a *large employer* if it employed at least 50 full-time and full-time equivalent (FTE) employees during the previous calendar year.²⁰

- The number of *full-time* employees is determined by counting each employee who averages 30 or more hours of service per week, not including extended break periods (such as summer break) or “special unpaid leaves” (such as FMLA leave).²¹
- The number of FTE employees is determined by adding together all of the hours worked each month by employees who are not full-time, then dividing the hours for each month by 130 (30 hours per week times 4.3 weeks in a month).²²

Example: Large Employer

District B has 56 employees: 42 full-time and 14 part-time. The part-time employees work a total of 1,300 hours in a month.

- $1,300 \text{ hours} / 130 = 10 \text{ FTEs}$
- $42 \text{ full-time} + 10 \text{ FTEs} = 52$

District B is a large employer.

²⁰ 78 Fed. Reg. 221 (Jan. 2, 2013), available at www.gpo.gov/fdsys/pkg/FR-2013-01-02/pdf/2012-31269.pdf.

²¹ Hinda Chaikind et al., Cong. Research Serv., R 41159, Summary of Potential Employer Penalties Under PPACA (P.L. 111-148) 1 (2010). Proposed rules include all hours paid, including holiday, vacation, and sick leave time, in the calculation of “hours of service.” 78 Fed. Reg. 218 at 223, available at www.gpo.gov/fdsys/pkg/FR-2013-01-02/pdf/2012-31269.pdf.

²² 78 Fed. Reg. 223, available at www.gpo.gov/fdsys/pkg/FR-2013-01-02/pdf/2012-31269.pdf.

Assessment for failure to offer insurance to all full-time employees:

Large employers that fail to offer health insurance to all full-time employees will be subject to an assessment.²³ An employer will be liable for an assessment under this provision if one or more full-time employees obtains insurance through the state exchange *and* receives a premium credit. The potential annual assessment is \$2,000 x [All full-time employees - 30].

Effective date for fiscal year plans (TRS districts):
First day of 2014 plan year
(September 1, 2014 for TRS districts)

Example: Assessment for Failure to Offer Coverage

District C has 42 employees who meet the test for full-time status under the ACA (average of 30 or more hours of service per week). District C offers insurance to 40 of these employees. The two employees who were not offered insurance obtain insurance through the state exchange and receive a premium credit.

- [42 full-time employees – 30] = 12
- 12 x \$2,000 = \$12,000

District C is subject to an annual assessment of \$12,000.

Substantial compliance exception (5% rule): The IRS has recognized an exception for substantial compliance. The exception is based on the number of full-time employees:

- 100 or more full-time employees: if the employer offers insurance to at least 95% of its full-time employees, the employer will not be subject to an assessment
- 99 or fewer full-time employees: if the employer offers insurance to all but 5 of its full-time employees, the employer will not be subject to an assessment

As discussed above, Texas districts offer insurance to employees who participate in the TRS retirement program or who are regularly scheduled for 10 or more hours per week. Most districts do not offer insurance, however, to variable hour employees, such as substitutes. A district may be subject to an assessment for failure to offer insurance to temporary employees and substitutes if:

- One or more variable hour employees meets the definition of full-time employee under the ACA (average of 30 or more hours of service per week);²⁴
- The district fails to offer insurance to one or more of such variable hour employees

²³ Hinda Chaikind et al., Cong. Research Serv., R 40942, Private Health Insurance Provisions in PPACA (P.L. 111-148) 7 (2010).

²⁴ The IRS has proposed rules for determining whether variable-hour employees average 30 or more hours per week, using a look-back period of three to 12 months. TASB plans to offer guidance on the look-back period at a later date.

- One or more full-time employees obtains insurance through the state exchange and receives a premium credit; and
- The district has more than 30 full-time employees overall;

If all of these criteria are met, the district may still be able to avail itself of the substantial compliance exception (5% rule) described above.

Effective date: This provision takes effect on January 1, 2014. However, the IRS has adopted transition relief for employers whose health insurance plans do not run on the calendar year—*fiscal year plans*. If an employer offers coverage under a fiscal year plan, the employer is not subject to an assessment, as to any full-time employee, if it offers the employee affordable, minimum value coverage no later than the first day of the 2014 plan year.²⁵

TRS-ActiveCare is a fiscal year plan. Accordingly, districts that participate in TRS-ActiveCare have until September 1, 2014 (the beginning of the TRS-ActiveCare plan year for 2014) to comply with this provision.

Affordability and minimum value: Beginning in 2014, large employers will have to pay an assessment if they do not offer health insurance that is affordable and provides minimum value, and one or more full-time employees obtains insurance through the state exchange and receives a premium credit.²⁶ The definitions of *large employer* and *full-time employee* were discussed above.

Effective date for fiscal year plans (TRS districts):
First day of 2014 plan year
(September 1, 2014 for TRS districts)

Affordability: Insurance is not *affordable* if the premium exceeds 9.5% of the employee’s household income.²⁷ The following principles apply to this calculation:

- Use the *lowest cost plan offered* that provides minimum essential coverage (MEC), even if the employee actually selects a different plan. For TRS districts, TRS-ActiveCare 1-HD is the lowest cost plan that provides MEC.
- Use the rate for *employee-only coverage*, even if the employee selects coverage for his or her spouse and/or dependents.
- Use the *net cost to the employee*, after deduction of the state and district contribution (\$2,700 minimum).²⁸

²⁵ 78 Fed. Reg. 236 (Jan. 2, 2013). The transition rules also prohibit the employer from limiting plan eligibility below the requirements in place as of December 27, 2012.

²⁶ Hinda Chaikind et al., Cong. Research Serv., R 41159, Summary of Potential Employer Penalties Under PPACA (P.L. 111-148) 1 (2010).

²⁷ Hinda Chaikind et al., Cong. Research Serv., R 41159, Summary of Potential Employer Penalties Under PPACA (P.L. 111-148) 2 (2010). The penalty also applies if the employers’ plan pays for less than 60% of covered health care expenses. For purposes of this paper, it is assumed that plans offered through TRS-ActiveCare meet the coverage thresholds.

²⁸ 78 Fed. Reg. 218 at 218 (Jan. 2, 2013), available at www.gpo.gov/fdsys/pkg/FR-2013-01-02/pdf/2012-31269.pdf.

The determination of household income is more complicated. *Household income* is defined as the modified adjusted gross income of the employee and any members of the employee's family (including a spouse and dependents) who are required to file an income tax return.²⁹ The IRS has recognized that it will be difficult for employers to determine household income levels for all employees. Accordingly, the IRS has proposed three safe harbors.

W-2 safe harbor: Under this safe harbor, an employer will not be subject to an assessment if the cost of coverage is 9.5% or less of the amount the employer reports for an employee in Box 1 of Form W-2—i.e., the wages paid by the employer to the employee.³⁰ This safe harbor is problematic because Box 1 excludes elective deferrals to a 401(k) or 403(b) plans and amounts an employee elects to contribute to a cafeteria plan (for, e.g., health insurance premiums, health FSAs, HSAs, or dependent care assistance).

Federal poverty line (FPL) safe harbor: Under this safe harbor, an employer will not be subject to an assessment if the cost of coverage is 9.5% or less of the FPL for a single individual, based on the most recently published poverty guidelines as of the first day of the employer's plan year.³¹ The FPL for 2012-13, for a single individual in Texas, was \$11,170. The monthly cost to the employee would have to be less than \$88 under this test. As set forth below, the Rate of Pay Safe Harbor provides more flexibility.

Rate of pay safe harbor: Under this safe harbor, an employer will not be subject to an assessment if the cost of coverage is 9.5% or less of the employee's rate of pay,³² calculated as follows:

- hourly employees: employee's hourly rate x 130
- salaried employees: employee's monthly salary

Example: Rate of Pay Safe Harbor—Teacher

A teacher has a monthly salary of \$3,400 (\$34,000 annually for ten months).³³ The teacher enrolls in TRS-ActiveCare Tier 2, employee-only coverage, at \$529 per month.

- Affordability threshold: $\$3,400/\text{month} \times 9.5\% = \$323/\text{month}$
- TRS-ActiveCare HD-1 premium (2013-14): \$325/month
- Net monthly cost to employee: $\$325 - \$225 \text{ (MOE)} = \$100/\text{month}$

The insurance offered by the district meets the affordability test under the ACA.

²⁹ 78 Fed. Reg. 220 (Jan. 2, 2013).

³⁰ 78 Fed. Reg. 234 (Jan. 2, 2013); *Revenue Notice 2011-73: Request for Comments on Health Coverage Affordability Safe Harbor for Employers* (September 13, 2011), www.irs.gov/pub/irs-drop/n-11-73.pdf.

³¹ 78 Fed. Reg. 235 (Jan. 2, 2013).

³² 78 Fed. Reg. 235 (Jan. 2, 2013).

³³ Based on rates for 2013-2014. www.trs.state.tx.us/trs_activecare/documents/ppo_rates_benefits_fy14.pdf.

Example: Rate of Pay Safe Harbor—Custodian

A full-time custodian makes \$8.10 per hour. The custodian enrolls in TRS-ActiveCare Tier 2 coverage for “employee & family” at \$1,060 per month.³⁴

- Affordability threshold: $(\$8.10 \times 130) \times 9.5\% = \$100/\text{month}$
- TRS-ActiveCare HD-1 premium (2013-14): \$325/month
- Net monthly cost to employee: $\$325 - \$225 \text{ (MOE)} = \$100/\text{month}$

The insurance offered by the district meets the affordability test under the ACA.

The proposed regulations do not address whether the rate of pay safe harbor is based *wages earned* or *wages paid*, a significant distinction for employees with annualized pay. During the academic year, the affordability test is easier to meet if wages earned, rather than wages paid, are used. During the summer, many employees do not earn any wages, so insurance would be considered unaffordable during those months. Also, the regulations are unclear as to an employer’s responsibility, in terms of affordability, for employees who work partial years but are offered insurance year-round.

Minimum value: Even if the plan offered by an employer is affordable, the employer may be subject to an assessment if the plan does not provide minimum value. *Minimum value* means the plan’s share of the total allowed cost of benefits is 60% or more of those costs. The Department of Health and Human Services (HHS) has issued guidance and proposed regulations regarding the methodology for determining minimum value.³⁵ The methodologies include a calculator that will be made available by the IRS and HHS in the future. Until the calculator and regulations are finalized, we cannot say with any certainty whether the TRS plans provide minimum value. TASB will continue to monitor this area and will update districts with any developments.

Substantial compliance: The substantial compliance exception described above also applies to the requirement that the insurance be affordable and provide minimum value. Thus, a district is not subject to an assessment if its insurance is affordable to all but 5% of its full-time employees (or all but 5 full-time employees if the district has fewer than 100 full-time employees).

Assessment: In 2014, the assessment under this provision will be \$3,000 for every full-time employee who obtains insurance through the exchange and receives a premium credit. For subsequent calendar years, the penalty will be indexed by a premium adjustment percentage.

³⁴ Based on rates for 2013-2014. www.trs.state.tx.us/trs_activecare/documents/ppo_rates_benefits_fy14.pdf.

³⁵ 77 Fed. Reg. 70644 (Nov. 26, 2012); Internal Revenue Notice 2012-31.

Example: Affordability Assessment

Five full-time employees of District C obtain insurance through the state exchange and receive premium credits. Further, the exchange certifies that the insurance offered by the district was not affordable for these employees.

- Annual assessment: $\$3,000 \times 5 = \$15,000$
- MOE savings: $\$1,800 \times 5 =$ - $\$9,000$
- Net cost to district: $\$6,000$ ($\$1,200$ per employee)

Remember, no assessment is payable unless all conditions are met:

- The employee is full-time, as defined by the ACA
- The insurance offered by the district is not affordable, as defined by the ACA, for that employee
- The employee declines insurance through the district
- The employee obtains insurance through the state exchange
- The employee receives a premium credit for insurance

A district may decide that it is less expensive to risk paying the assessment than for the district supplement the insurance premiums to the extent required to make the insurance affordable for all employees.

Effective date: The affordability and minimum value provisions are subject to the transition rules described above for fiscal year plans. Thus, districts that participate in TRS-ActiveCare must comply by September 1, 2014.

Automatic enrollment of full-time employees: A district with more than 200 full-time employees will be required to automatically enroll new full-time employees as soon as they are eligible for coverage.³⁶ Employees who are automatically enrolled may opt out. The ACA does not provide an effective date for this provision, but the United States Department of Labor (DOL) has concluded that employers are not required to comply until regulations are issued.³⁷ The DOL originally indicated that it would issue rules by the end of 2014.³⁸ In February 2012, the DOL revised this statement to indicate that rule-making will not be completed in 2014.³⁹

Effective date:
2014 or later
(awaiting rules
from DOL)

³⁶ Hinda Chaikind et al., Cong. Research Serv., R 40942, Private Health Insurance Provisions in PPACA (P.L. 111-148) 8 (2010).

³⁷ www.dol.gov/ebsa/faqs/faq-aca5.html.

³⁸ www.dol.gov/ebsa/faqs/faq-aca5.html.

³⁹ www.irs.gov/pub/irs-drop/n-12-17.pdf.

Nondiscrimination Rules

Treating health insurance premiums for superintendents as nontaxable income may violate new nondiscrimination rules. Employers are accustomed to laws prohibiting discrimination based on race, sex, age, disability, and other protected characteristics. In the health benefits context, nondiscrimination prohibits advantages in favor of highly-compensated employees.

Estimated effective date for TRS districts: September 1, 2014
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Self-funded plans are already subject to nondiscrimination rules. The ACA extends these rules to employers with fully-insured plans that are not grandfathered.⁴⁰ It is unclear whether districts that participate in TRS-ActiveCare would fall under the rules applicable to self-insured plans or those applicable to fully-insured plans. TRS-ActiveCare is a self-insured plan, but districts do not retain any risk of loss, as is typical for a self-insured plan. Thus, districts are arguably fully-insured. By extending nondiscrimination rules to fully-insured plans, the ACA resolves any lingering doubt as to whether districts must comply with the nondiscrimination rules.

The ACA prohibits discrimination by fully-insured plans in favor of *highly-compensated employees* (HCE). The ACA does not specify who is and is not an HCE: It is expected that this term will be defined in regulations. Until regulations are adopted, the definition under the rules for self-insured plans provides a good predictor of how HCE will be defined for fully-insured plans. Under the rules for self-insured plans, an HCE is an employee who is: (1) one of the five highest paid officers in the organization; or (2) in the top 25 percent highest paid employees.⁴¹ In most districts, this would include the superintendent.

The nondiscrimination rules prohibit a group health insurance plan from discriminating with respect to health benefits.⁴² Some districts pay more toward the health insurance premiums for an HCE, such as a superintendent, than for other employees—“excess premium payments.” For example, a district may pay \$225 per month in “maintenance of effort” toward the premiums of a teacher or a custodian, while the district pays the entire premium for the superintendent. Under the nondiscrimination rules, excess premiums must be treated as taxable income.

Penalties: The penalties for violation of the nondiscrimination rules are harsh. If a self-insured plan violates the nondiscrimination rules, the *employee* is subject to an excise tax on the value of the benefits received. If a fully-insured plan violates the nondiscrimination rules, the IRS has suggested a penalty on the *employer* of \$100 per employee discriminated against (i.e., everyone other than the superintendent) per day.⁴³

⁴⁰ Rev. Notice 2010-63, 2010-41 I.R.B., available at www.irs.gov/irb/2010-41_IRB/ar07.html.

⁴¹ 26 C.F.R. § 1.105-11(d). The definition also includes the owner of a company. This prong of the definition is inapplicable to Texas school districts.

⁴² Rev. Notice 2010-63, 2010-41 I.R.B., available at www.irs.gov/irb/2010-41_IRB/ar07.html.

⁴³ Rev. Notice 2010-63, 2010-41 I.R.B., available at www.irs.gov/irb/2010-41_IRB/ar07.html.

Example

District A has 1,000 full-time employees who are enrolled in a fully-insured plan. The district pays \$250 per month toward the insurance premiums for each full-time employee. Under its contract with the superintendent, however, the district pays the superintendent's entire premium of \$529 per month.

The district could be subject to a penalty of \$99,900 *per day*: 999 (employees discriminated against) x \$100/day.

Effective date: The nondiscrimination rules were to take effect with plan years beginning after September 23, 2010.⁴⁴ The IRS has delayed enforcement until after regulations have been issued.⁴⁵ However, districts should start planning now for compliance. The appropriate resolution depends on your superintendent's compensation plan, the district's overall financial condition, and other local factors.

One solution is to treat excess premium payments—the difference between the amount the district pays toward the superintendent's premiums and the amount the district pays toward other employees' premiums—as taxable income subject to withholding. Another alternative is to convert excess premium payments to salary, with or without a “gross up” for the additional tax burden. If a district and superintendent agree to convert excess premium payments to compensation, the district should communicate the reason for the change—and the net effect on the district's finances—to the community, to avoid the appearance that the superintendent is being unjustly enriched.

Administrative Responsibilities

The ACA imposes a number of new notice and reporting requirements on employers and plan sponsors. Districts that participate in TRS-ActiveCare will rely on TRS to manage some of these notices, as indicated by the following chart.

Requirement	Effective Date	TRS or District?
Provide all new enrollees with a uniform summary of benefits, presented in a way that can be understood by the average enrollee. ⁴⁶		TRS issues the uniform summary of benefits.

⁴⁴ Rev. Notice 2010-63, 2010-41 I.R.B., available at www.irs.gov/irb/2010-41_IRB/ar07.html.

⁴⁵ Rev. Notice 2011-1, 2011-2 I.R.B., available at www.irs.gov/irb/2011-02_IRB/ar10.html.

⁴⁶ Hinda Chaikind et al., Cong. Research Serv., R 40942, Private Health Insurance Provisions in PPACA (P.L. 111-148) 35-36 (2010).

Requirement	Effective Date	TRS or District?
Report the aggregate cost of employer sponsored coverage on Form W-2 (employers with 250 or more employees). ⁴⁷	Beginning with W-2s issued in 2013 (on 2012 earnings).	District responsibility.
Provide new employees with information about the existence of the health insurance exchange in the employee's state. ⁴⁸	Delayed until rules are issued. ⁴⁹	District responsibility.
Submit to the Secretary of Health and Human Services information about health insurance plans and employee enrollment. ⁵⁰	Beginning in 2014	District responsibility. Districts may have to obtain some of the required information from TRS. ⁵¹
Certify to the IRS that all full-time employees were offered health care coverage, including length of waiting period, premiums, and employer's share of the cost. ⁵² Employers must also provide data on the number of full-time employees.	Delayed until 2015. ⁵³	District responsibility.

Reporting benefits costs on W-2s: Beginning with W-2s issued in 2013 (on 2012 income), districts must report the cost of coverage under an employer-sponsored group health plan.⁵⁴ Reporting the cost of health care coverage on the Form W-2 does not mean that the coverage is taxable. The value of the employer's excludable contribution to health coverage continues to be excludable from an employee's income. The reporting is for informational purposes only and is intended to provide employees useful and comparable consumer information on the cost of their health care coverage.

The value of the health care coverage will be reported in Box 12 of Form W-2, with Code DD to identify the amount. In general, the amount reported should include both the portion paid by the employer and the portion paid by the employee. The IRS has produced a chart that summarizes the reporting requirements.⁵⁵

⁴⁷ Revenue Notice 2012-09 (2012), available at <http://www.irs.gov/pub/irs-drop/n-12-09.pdf>

⁴⁸ Hinda Chaikind et al., Cong. Research Serv., R 40942, Private Health Insurance Provisions in PPACA (P.L. 111-148) 43 (2010).

⁴⁹ *FAQs about Affordable Care Act Implementation Part XI*, www.dol.gov/ebsa/faqs/faq-aca11.html.

⁵⁰ Hinda Chaikind et al., Cong. Research Serv., R 40942, Private Health Insurance Provisions in PPACA (P.L. 111-148) 8, 44 (2010).

⁵¹ For example, claims payment policies, enrollment information, information on cost sharing and rating policies, information on out-of-network coverage, and information on participant rights.

⁵² Hinda Chaikind et al., Cong. Research Serv., R 40942, Private Health Insurance Provisions in PPACA (P.L. 111-148) 44 (2010).

⁵³ Revenue Notice 2012-33.

⁵⁴ Form W-2 Reporting of Employer-Sponsored Health Coverage, available at www.irs.gov/uac/Form-W-2-Reporting-of-Employer-Sponsored-Health-Coverage.

⁵⁵ Available at www.irs.gov/uac/Form-W-2-Reporting-of-Employer-Sponsored-Health-Coverage.

The IRS has provided transition relief that limits the applicability of the W-2 reporting requirement to employers with 250 or more employees. An employer is not subject to the reporting requirement for any calendar year if the employer was required to file fewer than 250 Forms W-2 for the preceding calendar year.⁵⁶ Therefore, if a district filed fewer than 250 Forms W-2 for tax year 2011, the district would not be subject to the reporting requirement for 2012 Forms W-2. The transition relief applies until the IRS issues further guidance to the contrary.⁵⁷

Flexible spending accounts: The ACA places limits on contributions to flexible spending accounts (FSAs). FSAs are arrangements under which employees have amounts deducted from their compensation, on a pre-tax basis, for medical expenses not covered by insurance. In the past, the law did not limit annual employee contributions, although employers could impose limits. Effective January 1, 2013, the ACA prohibits employees from contributing more than \$2,500 annually to a health FSA.⁵⁸ This amount will be indexed to inflation starting in 2014.

Cadillac tax: Starting in 2018, the ACA will impose a 40% excise tax on health plan administrators if the cost of coverage exceeds certain thresholds.⁵⁹ This is known as the “Cadillac tax.” The thresholds are \$10,200 for single coverage and \$27,500 for family coverage, with both amounts indexed to the Consumer Price Index plus 1% in years after 2018.⁶⁰

This provision again raises the issue of the status of districts that participate in TRS-ActiveCare. The penalty is imposed on *health plan administrators*. Since Texas districts that participate in TRS-ActiveCare do not contract for TRS health plans, it is not clear that they are health plan administrators.

Even if they are covered, districts do not need to worry about the Cadillac tax just yet. This special tax does not take effect until 2018.⁶¹ Moreover, at least under 2013-14 rates, TRS-ActiveCare does not meet the thresholds.⁶² The cost for the most expensive employee-only plan offered by TRS-ActiveCare is around \$9,552 per year, which is below the \$10,200 threshold. Similarly, the cost for the most expensive family plan offered by TRS-ActiveCare is about \$23,880 per year, which is below the \$27,500 threshold.

⁵⁶ Revenue Notice 2012-9, available at www.irs.gov/pub/irs-drop/n-12-09.pdf.

⁵⁷ Revenue Notice 2012-9, available at www.irs.gov/pub/irs-drop/n-12-09.pdf.

⁵⁸ Janemarie Mulvey, Cong. Research Serv., R 41128, Health-Related Revenue Provisions in the Patient Protection and Affordable Care Act (PPACA) 7-8 (2010).

⁵⁹ Janemarie Mulvey, Cong. Research Serv., R 41128, Health-Related Revenue Provisions in the Patient Protection and Affordable Care Act (PPACA) 3 (2010).

⁶⁰ Janemarie Mulvey, Cong. Research Serv., R 41128, Health-Related Revenue Provisions in the Patient Protection and Affordable Care Act (PPACA) 3 (2010).

⁶¹ Janemarie Mulvey, Cong. Research Serv., R 41128, Health-Related Revenue Provisions in the Patient Protection and Affordable Care Act (PPACA) 3 (2010).

⁶² Teacher Retirement System, *TRS-ActiveCare HMO Rates and Benefits for 2011-2012*, 2011, available at www.trs.state.tx.us/TRS_activecare/documents/hmo_rates_benefits_fy12.pdf, Teacher Retirement System, *TRS-ActiveCare PPO Rates and Benefits for 2011-2012*, 2011, available at www.trs.state.tx.us/TRS_activecare/documents/ppo_rates_benefits_fy12.pdf.

Conclusion

The ACA is complicated and can be overwhelming. For Texas districts, TRS will bear much of the burden of plan compliance, allowing districts to focus on other issues, such as the nondiscrimination clause, affordability, and new administrative requirements. Most of the employer responsibilities will become effective with the 2014 plan year (beginning September 1, 2014 for TRS districts). Districts should look for updates and further guidance as deadlines approach and rules are clarified.

This document is provided for educational purposes only and contains information to facilitate a general understanding of the law. It is neither an exhaustive treatment of the law on this subject nor is it intended to substitute for the advice of an attorney. It is important for the recipient to consult with the district's own attorney in order to apply these legal principles to specific fact situations.

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