



A New Way for a New Workforce

New ACA Developments – What Does This Mean for Employers?

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April 2016

- *2016 Political Perspective*
- *New Developments*
- *Benefits Questions from Around the U.S.*
- *Common ACA Reporting Issues*

2016—The Political Perspective



2016—The Political Perspective

Democrats (10)

Michael Bennet (Colorado)

Richard Blumenthal (Connecticut)

Barbara Boxer (California) **retiring in 2016**

Patrick Leahy (Vermont)

Barbara Mikulski (Maryland) **retiring in 2016**

Patty Murray (Washington)

Harry Reid (Nevada) retiring in 2016

Brian Schatz (Hawaii)

Charles Schumer (New York)

Ron Wyden (Oregon)

Republicans (24)

Kelly Ayotte (New Hampshire)

Roy Blunt (Missouri)

John Boozman (Arkansas)

Richard Burr (North Carolina)

Dan Coats (Indiana) retiring in 2016

Mike Crapo (Idaho)

Chuck Grassley (Iowa)

John Hoeven (North Dakota)

Johnny Isakson (Georgia)

Ron Johnson (Wisconsin)

Mark Kirk (Illinois)

James Lankford (Oklahoma)

Mike Lee (Utah)

John McCain (Arizona)

Jerry Moran (Kansas)

Lisa Murkowski (Alaska)

Rand Paul (Kentucky)

Rob Portman (Ohio)

Marco Rubio (Florida) retiring in 2016

Tim Scott (South Carolina)

Richard Shelby (Alabama)

John Thune (South Dakota)

Pat Toomey (Pennsylvania)

David Vitter (Louisiana)



46 Democrats



54 Republicans



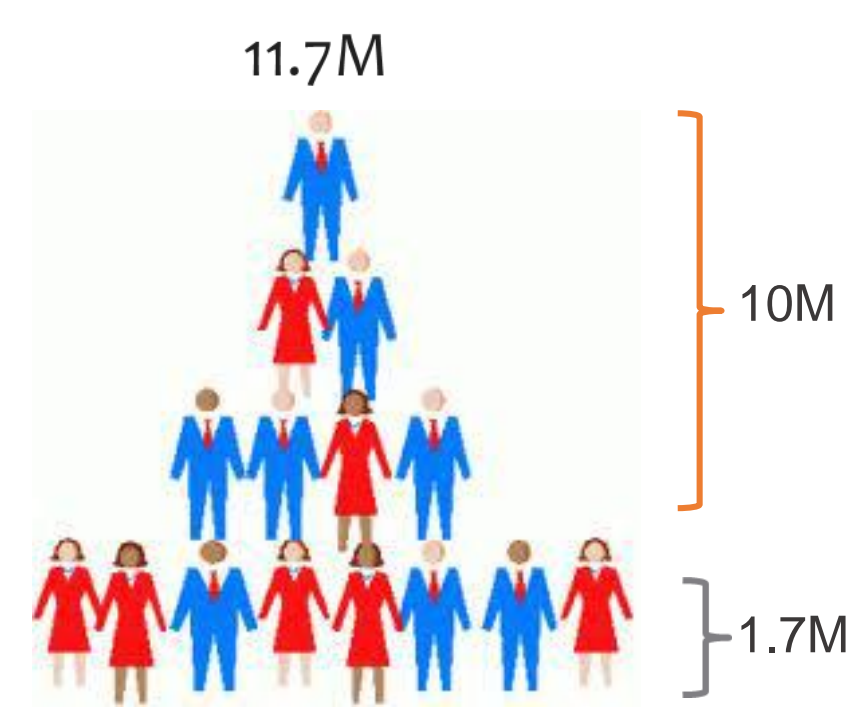
8 Point Spread



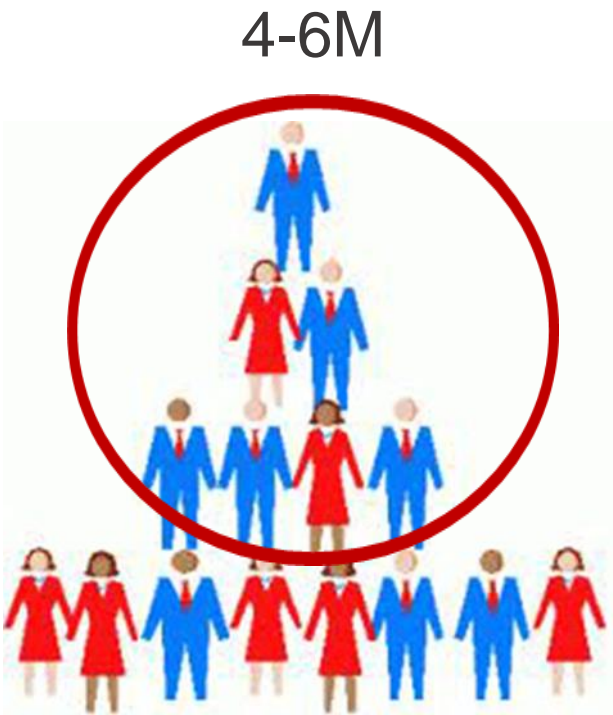
OBAMACARE

STATE OF ACA

- Budget Office estimates that by 2019, the federal government can expect to collect up to \$17 billion in penalties stemming from the individual mandate as well as \$52 billion from the employer mandate.
- In fiscal 2014, the first year of the ACA exchanges, the federal government spent > \$17 billion on subsidies
- By 2023 (10th year) the federal government will be spending @ \$134 billion on subsidies.



2015 Total Enrollment



Unofficial Estimate of Ineligibles



NEW DEVELOPMENTS - BENEFITS

- **ACA Reporting Deadline Extended – Notice 2016-4**

	New Deadline	Old Deadline
Deadline to Distribute Forms to Employees and Covered Individuals	March 31, 2016	February 1, 2016
Deadline to File with the IRS	May 31, 2016 (non-electronic)	February 29, 2016 (non-electronic)
	June 30, 2016 (electronic filers)	March 31, 2016 (electronic filers)

- Employees who do not receive their forms until after the April 15 tax filing deadline will not need to file an amended return – they should keep their forms should they need them later
- IRS will not respond formally to employer requests for extensions for CY2015, as these latest extensions apply automatically and are more generous

- Protecting Americans from Tax Hikes (PATH) Act / Consolidated Appropriations Act
- Cadillac Tax – two year delay, now effective in 2020
 - ACA imposes a 40% tax on the value of high-cost health insurance in excess of the following thresholds (single/family): \$10,200 / \$27,500
 - PATH Act also makes payment of the Cadillac tax a deductible business expense
 - Proposed FY2017 Federal Budget modifies the threshold to equal the average premium for a Marketplace gold plan in each State, if higher than above threshold
- Medical Device Tax – two year moratorium on the 2.3% tax on sale of medical devices
 - Tax will not apply to medical devices sales in 2016 and 2017
- Health Insurance Industry Tax – one year moratorium for calendar year 2017
 - Should result in less of an increase to group health insurance premiums for 2017

- Protecting Americans from Tax Hikes (PATH) Act / Consolidated Appropriations Act
- **Permanent** parity between parking and mass transit benefits

	2016	2015
Parking	\$255 per month	\$250 per month
Transit	\$255 per month	\$250 per month (retroactively)

- Notice 2016-06 provides guidance for employers who provided transit benefits greater than \$130 per month on a taxable basis
 - Notice contains procedures for employers who have already filed their 4th quarter form or who have not repaid or reimbursed employees prior to filing the 4th quarter form 941
 - Notice also contains instructions for W-2 reporting

- IRS Allows Employers and Carriers to provide identity protection on a nontaxable basis
- Announcement 2016-02
- Cost of credit monitoring or identity protection services provided by an employer or other organization (e.g., insurance carrier) to which the individual provided personal information (e.g., name, SSN, banking or credit account numbers)
 - Prior guidance had indicated that identity protection services would be excludable from income only if the services were provided in connection with a data breach

- IRS Notice 2015-87
- **Guidance on HRAs and “employer payment plans”**
- Notice confirms that:
 - Premiums for individual health insurance policies are not reimbursable under an HRA or through a cafeteria plan
 - Employers may provide stand-alone “retiree” HRAs to former employees that can reimburse individual premiums
 - Spouses and dependents must be enrolled in group health plan coverage for an active employee HRA to reimburse claims for spouses and dependents
 - HRAs covering family members cannot be integrated with single coverage
 - Stand-alone HRAs may be used for “excepted” benefits such as dental and vision

- IRS Notice 2015-87 (con't)
- **Guidance on Opt-Out Benefits**
 - Flex-credits that can be used to pay for medical care (e.g., FSA contribution) or the employer's health premiums are considered an employer contribution
 - “Unconditional” Opt-Out Payments must be added to employee's cost of coverage
 - “Conditional” Opt-Out Payments do not have to be added to the cost of coverage
 - Under a conditional opt-out, payment is available only if the employee can demonstrate enrollment in other coverage
 - Best practice: Limit “other coverage” to employer-sponsored plans

- IRS Notice 2015-87
- Guidance on Opt-Out Benefits (con't)
 - Transition relief for opt-out arrangements in effect prior to December 16, 2015
 - For ACA reporting purposes, eligible employers may treat non-health flex credits (e.g., opt-out payments) as employer contributions for plan years beginning before 1/1/17
 - Because treating the payment as an employer contribution may affect an employee's eligibility for a premium subsidy, the IRS encourages employers not to reduce the amount of the employee's required contribution on Line 15 of Form 1095-C by the amount of an opt-out payment
 - Employers that do so will be able to claim relief under the Notice if contacted by the IRS regarding an assessable payment

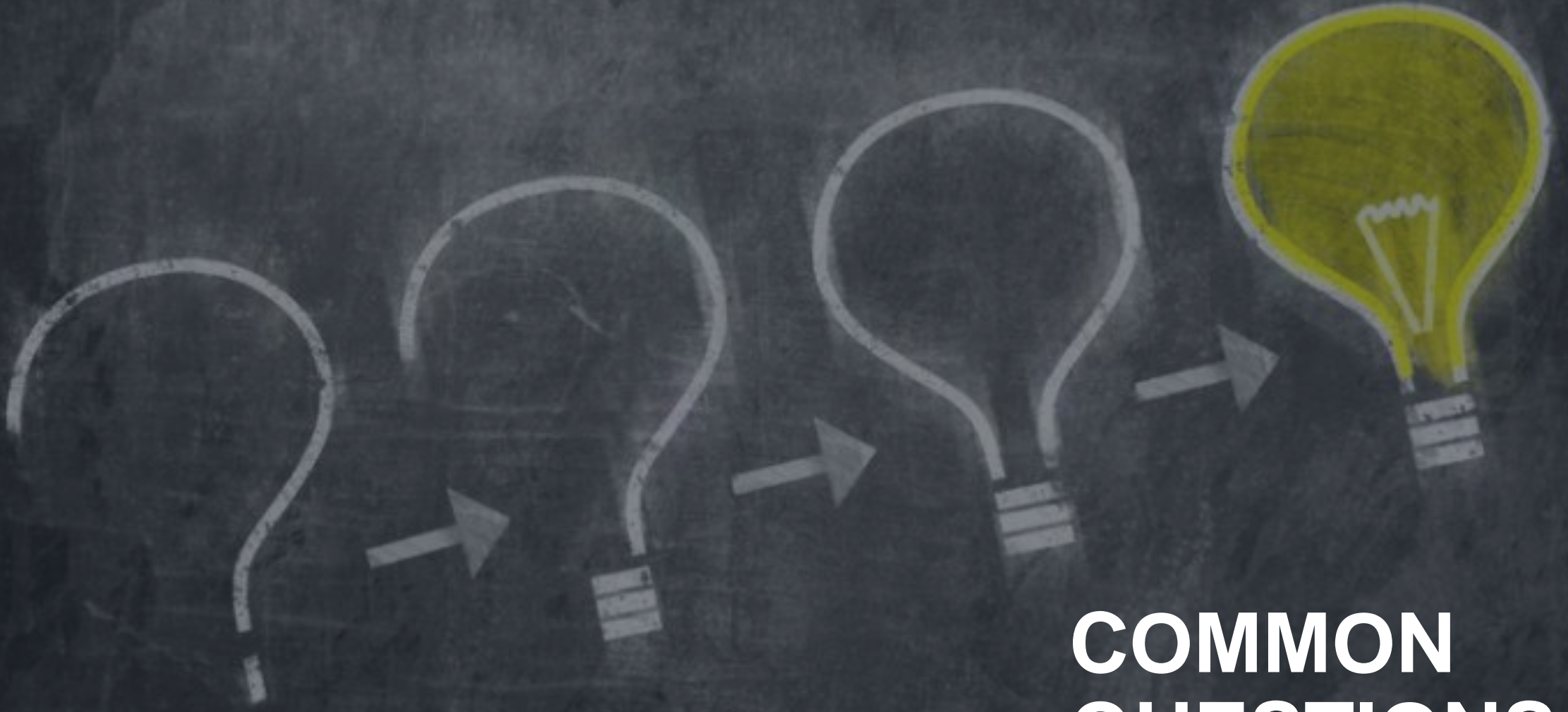
- IRS Notice 2015-87 (con't)
- **Pay-or-Play Guidance**
 - Notice adjusts “affordability” safe harbors to align with annual adjustments to household income
 - W-2, Rate of Pay and Federal Poverty Level safe harbors are based on 9.5% of the applicable amount (wages, pay rate, or FPL), as indexed
 - Adjustment is retroactive to January 1, 2015
 - 2015: 9.56% 2016: 9.66%
- Confirms that employer mandate penalties increase starting in 2015
 - 2015: \$2,080 / \$3,120 2016: \$2,160 / \$3,240
- Also: Rev. Proc. 2016-11 increases ACA reporting penalties from \$250 (\$500 for willful failures) to \$260 (\$520 for willful failures)

- IRS Notice 2015-87 (con't)
- Service Contract Act & Davis-Bacon Act Employees
- Until further guidance is provided, employers with SCA & DBA employees may treat “cash-in-lieu” payments as employer contributions toward the cost of health coverage
- IRS encourages employers not to reduce the amount of the employee’s required contribution on Line 15 of Form 1095-C by the amount of a cash-in-lieu payment
- Employers that do so will be able to claim relief under the Notice if contacted by the IRS regarding an assessable payment
- Educational Institutions: Employees who primarily perform services for one or more educational organizations are subject to the “26 week” rehire rule

- IRS Notice 2015-87 (con't)
- Guidance on Application of COBRA to Health FSAs with \$500 Carryover Feature
 - Employers that allow carryovers must also allow them for COBRA participants
 - This could extend COBRA past the end of the plan year; however, an employer may limit the carryover to employees who elect to contribute to the FSA in the following year, in which case COBRA ends at the end of the plan year
 - Employers may limit carryovers to a maximum period (e.g., one or more years)

- EEOC v. Flambeau
- Employees required to complete an HRA and biometric screening on a specific day
- Participating employees receive \$600 premium credit
- An employee was unable to participate because he was absent from work due to hospitalization for cardiomyopathy and congestive heart failure
- Flambeau allegedly refused to reschedule tests when employee returned
- Employee's coverage was terminated shortly thereafter, although Flambeau agreed to reinstate, subject to employee's completion of the HRA and screening
- EEOC sued Flambeau nonetheless; case was dismissed December 30, 2015
 - Following *Seff v. Broward County*, the court found that the program was protected under ADA bona fide plan safe harbor

- *Montanile v. Board of Trustees of the National Elevator Industry Health Benefit Plan*
- Montanile was injured by a drunk driver, whom he later sued and recovered \$500,000
- The Plan paid \$120,000 in medical expenses and sought reimbursement from Montanile
- Montanile argued that he had already spent most of the funds on daily living expenses and that no identifiable fund existed against which to enforce the lien
- SCOTUS held (in an 8-1 opinion) that when a participant spends the settlement on “nontraceable” items, the plan cannot bring a claim under ERISA for equitable relief and attach the participant’s separate assets
- Nontraceable items include groceries, utility, internet, cable and phone bills, gambling, medical expenses, and other disposable items
 - Nontraceable items would not include cars, boats, stocks, bonds, or other similar items that can be traced back to the original settlement funds



**COMMON
QUESTIONS**

Common questions

Can we identify high cost claimants and encourage them to move on to an exchange plan or Medicare?

- No
 - The practice can violate ERISA, HIPAA, ADA, the Code and the Medicare Secondary Payer Fraud Rules

Common questions

Do All Hours Count?

Generally, yes

- Every hour counts:
 - All hours for which your employees are paid or are entitled to be paid; and
 - All hours for which your employees are entitled to be paid although they may not be performing work—PTO, vacations, sick, pre-tax short- and long-term disability, jury duty, military duty, maternity or paternity leave, or other paid leaves.
- No “501 hour” limit

Common questions

Do All Hours Count?

- Some do not:



- Hours after an employee has terminated (!)
- Hours reflecting workers compensation payments
- Hours solely reflecting reimbursement to an employee for medical or medically related expenses incurred by the employee
- Hours reflecting STD or LTD payments for which premiums were paid by employees on an after-tax basis (or included in income)

Common questions

How Do I Count Hours for Full-Time Temporary Employees?

- There is no special rule
- A temporary employee has his/her hours counted just like every other employee
- To avoid potential penalties, an offer of coverage generally must be made within 90 days of employment for an employee working 30+ hours a week—even if he/she is “temporary”

Common questions

What is a Seasonal Employee? Doesn't the ACA let me just exclude seasonal employees?

- No. A special rule for excluding some seasonal workers applies when counting FTE to determine ALE status, but that rule does not apply in the counting-hours-to-determine-whether-to-offer-coverage-context
- Seasonal Employee: hired into a position for which the customary annual employment is six months or less
- “Customary” means that:
 - by the nature of the position an employee typically works for a period of six months or less &
 - the period of employment should begin each calendar year in approximately the same part of the year, such as summer or winter

Common questions

How do I deal with seasonal employees?

- Treat them as **variable hour employees**
- If an employee is truly seasonal, an employer using a 12-month look-back period will never have to make an offer of coverage
- Because the remaining 6+ months in the look-back period will be Zeros

Offers of coverage

What do I do about employees who leave and come back?

- Service prior to a 13 week break can be disregarded
 - 26 weeks for employees of educational institutions
 - For employees of staffing agencies providing services to educational institutions, 26 weeks unless the employee has a “meaningful opportunity for placement” with a non-educational employer
 - Rules applies regardless of common law employee status
 - e.g., a bus driver who works for a staffing agency who’s primary placement is a school is subject to 13 weeks if he is provided a meaningful opportunity to drive for non-educational entity when school is out
- *Rule will apply prospectively when released

Common questions

When should I offer COBRA to an employee in a stability period who changes to part-time?

- Generally Three Options:
 1. Continue to provide coverage for the remainder of the stability period regardless of the change. At the end of the stability period, offer COBRA if the employee is no longer considered FT
 2. Terminate coverage immediately and offer COBRA
 - Employer may be exposed to the \$3,000 penalty for offering unaffordable coverage during the stability period
 - Exposure will remain as long as the employee is required to be treated as FT (e.g., end of the stability period)

Common questions

When should I offer COBRA to an employee in a stability period who changes to part-time?

- Generally Three Options:
 3. Terminate coverage at the end of the 3rd month after the employee has changed from FT to PT status and then offer COBRA
 - This eliminates exposure to the \$3,000 penalty
 - Under this 3 month rule, the employee may be measured under the monthly method until the end of the next measurement period (and administrative period) to begin after the change to part time
 - The employer will qualify for this rule if the employee has been continuously offered minimum value coverage by the end of the 3rd full calendar month of employment

Common ACA Reporting questions

How do I report for all members of the controlled group?

- **You don't.** Reporting is performed on a per-EIN basis
- Each entity with its own EIN completes its own Authoritative 1094-C

How do I report on an employee who has declined coverage?

- There's no code specifically for an employee who declines the employer's plan
- Line 16 of form 1095-C should be left blank, or use the code for the applicable safe harbor that applies (e.g., 2F, 2G or 2H if the employer is using the W-2, FPL, or Rate of Pay safe harbor)

Common ACA Reporting questions

Do I have to report on every employee who worked 130 hours in one or more months of 2015?

- **Not necessarily.** Employees who are otherwise eligible for coverage do not need a 1095-C if they terminate employment before the first day of the fourth full calendar month of employment, as long as the employee does not enroll in self-insured coverage during that time
- Length of waiting period is irrelevant

How do I report on our company's "working spouse" rule?

- Plans that exclude spouses who have access to other employer coverage have still made an offer of spousal coverage for reporting purposes

Common ACA Reporting questions

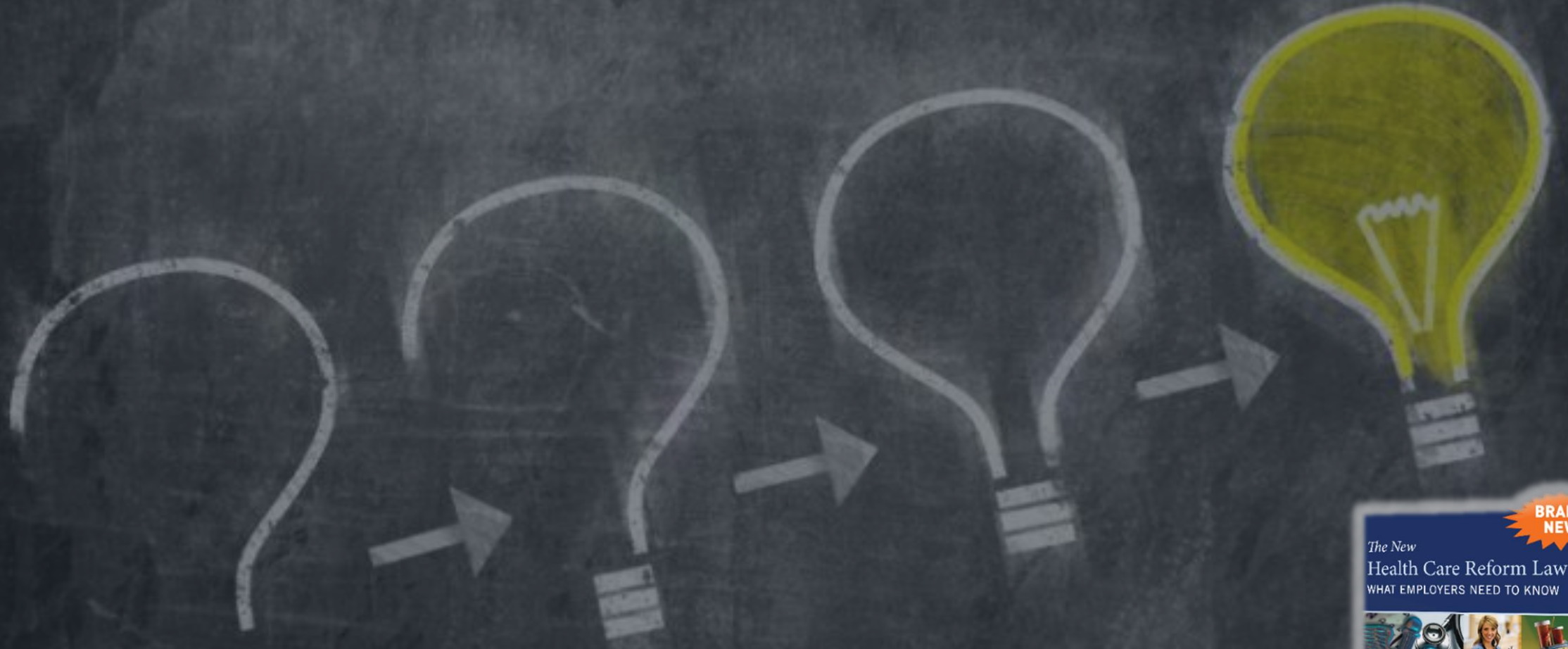
How do I report on union employees?

- Use code 1H in line 14 and code 2E in line 16 of form 1095-C for any month for which the multiemployer rule applies, regardless of whether any other code (including 2C) applies
 - Multiemployer rule: An employer qualifies if it is required to contribute to a multiemployer plan pursuant to a collective bargain agreement
 - The multiemployer plan must offer affordable, minimum value coverage that includes an offer of coverage to dependent children

ACA Reporting quick reference chart

	Fully Insured Plan	Self-Insured Plan
Insurance Carrier	Forms 1094-B and 1095-B	Not Applicable
Non-ALE (Small Employer: Fewer than 50 full-time equivalent employees on average in prior calendar year)	Not required to file	Forms 1094-B and 1095-B
ALE (Applicable Large Employer: 50 or more full-time equivalent employees on average in prior calendar year)	Forms 1094-C and 1095-C (Parts I and II only)	Forms 1094-C and 1095-C (Parts I, II and III) <i>Either B-Series or C-Series Forms for non-employees</i>

QUESTIONS ?



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