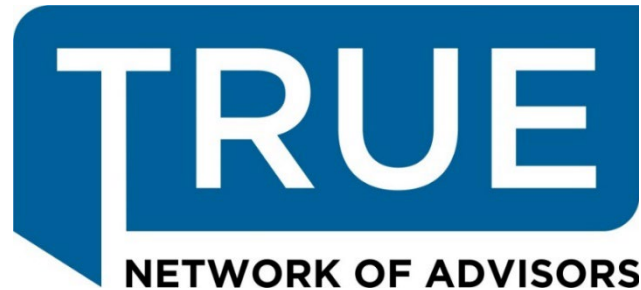


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# End of Year Benefits Compliance Considerations

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Presented By:  
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November 5, 2024

Best Lawyers 

The "RATED BY Super Lawyers" logo consists of the words "RATED BY" in a small, black, sans-serif font above the words "Super Lawyers" in a larger, black, serif font, all enclosed within a thin orange border.

**Happy Election Day!**  
**Don't forget to VOTE**

# Agenda

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- ▶ **End of Year Compliance Considerations:**
  - **Gag Clause Prohibition and Attestations**
  - **W-2 Reporting**
  - **Medicare Part D Creditable Coverage Requirements**
  - **HIPAA Reproductive Health Care PHI Rules**
  - **Other 2025 Compliance Considerations**
- ▶ **ACA Reporting & Employer Mandate Considerations:**
  - **2025 Reporting Deadlines (for 2024 Year)**
  - **ACA Reporting & Employer Mandate Overview**
  - **Key Year-End Takeaways**

# Gag Clause Prohibition

- ▶ CAA, 2021 prohibits group health plans and insurers from entering into agreements with providers, networks, TPAs, or other service providers offering access to a network, which contain “gag clauses” that restrict the plan/insurer from:
  - Furnishing provider-specific cost or quality of care info to referring providers, plan sponsors, participants/beneficiaries
  - Electronically accessing de-identified claims info for a participant or beneficiary, and/or
  - Sharing the above info with business associates
- ▶ CAA also requires plans/insurers to submit annual attestations, confirming that there are no prohibited gag clauses in their agreements
- ▶ Annual attestations must be submitted to CMS by the end of each calendar year

# Gag Clause Attestations

- ▶ 2024 annual attestations due by [December 31, 2024](#)
  - Current attestation covers all applicable agreements entered into or renewed since the date on which you submitted the previous year's attestation (which was due by 12/31/23) through the date on which you submit the current attestation
- ▶ Agencies issued FAQ guidance ([Part 57](#)) last year, and published updates to the Annual Submission Instructions, User Manual, and Excel Template file in August of 2024, all of which are available through the [CMS Website](#) (Note: Excel file is not needed for single employer submissions)
- ▶ Attestations are to be submitted through the "[GCPCA webform](#)" portal on CMS's Health Insurance Oversight System (HIOS) website

# Gag Clause Attestations

## ▶ Reporting Entity Type:

- ERISA Group Health Plan (GHP) – Unless your organization is a church/church-affiliate or a state/local governmental entity, then you should select this option
- Church Plan – Only if church/church-affiliate, taking the position that its plan(s) are exempt from ERISA under the church plan exemption
- (Non-Federal) Governmental Group Health Plan – Only if state/local government entity (including some quasi-governmental), taking the position that its plan(s) are exempt from ERISA under the governmental plan exemption
- Health Insurance Issuer

## ▶ Are you attesting for all provider agreements?

- Medical Network
- Pharmacy Benefit Manager (PBM) Network
- Behavioral Health Network
- Other (Benefits offered under any other type of ERISA GHP that contracts with providers/networks)

## ▶ ERISA Plan Number:

- If you file 5500s, use the plan # on the 5500 (likely will be “501”)
- If you do not file 5500s, use “000”

# Form W-2 Reporting

- ▶ **W-2, Box 12 – Benefits reporting:**
  - **HSA: Report all employer and employee HSA contributions made through payroll as a single aggregated amount (Code W)**
  - **Group term life insurance in excess of \$50,000 (Code C)**
  - **Health Plan Coverage: Report the cost of coverage under an employer-sponsored group health plan (Code DD)**
  - **Third-party sick/disability pay that is not includible in income because employee paid premiums on after-tax basis (Code J) (and third-party sick pay box in Box 13 should be checked)**
  - **401(k) Plan – Pre-tax deferrals (Code D) and designated Roth contributions (Code AA)**
  
- ▶ **W-2, Box 10 – Dependent care reporting:**
  - **Report dependent care benefits, including benefits received under Dependent Care FSAs (*aka*, DCAPs) in Box 10**
  
- ▶ **W-2, Box 14 – Optional reporting items**

**January 31, 2025:**  
**Deadline to file 2024 W-2s with SSA and to distribute W-2s to employees**

# Medicare Part D Creditable Coverage

- ▶ Group health plan sponsors must make annual determination as to whether plan's prescription drug coverage is creditable or non-creditable, and must:
  1. Submit annual disclosure to CMS regarding creditable or non-creditable status of plan's Rx coverage; and
  2. Provide (at least) annual notices to Medicare Part-D eligible employees regarding creditable or non-creditable status of plan's Rx coverage
- ▶ Annual disclosures to CMS can be made through CMS Website
- ▶ Deadline for CMS disclosures:
  - Must submit **within 60 days after the first day of the plan year** (*i.e.*, renewal year, contract year, filing year, etc.)
  - March 1 for calendar year plans



# Medicare Part D Creditable Coverage

- ▶ **Creditable or non-creditable coverage notices to Part D-eligible employees must be provided:**
  - 1. Prior to start of the Annual Coordinated Election Period (ACEP) for Part D each year (*i.e.*, before October 15)**
  - 2. Prior to an individual's initial enrollment period (IEP) for Part D**
  - 3. Prior to the effective date of coverage for any Part D eligible individual that enrolls in employer's Rx coverage**
  - 4. Whenever employer no longer offers Rx coverage or changes it so that it becomes, or ceases to be, creditable**
  - 5. Upon request by Part D eligible individual**

CMS has stated that if Notices are provided to all participants annually prior to October 15 each year, CMS will consider requirements 1 & 2 (the ACEP and IEP notice requirements) to have been met.

Due to the above, if employers include **Notices with initial, special, and open enrollment materials**, employers meet requirements 1, 2, & 3.

# Medicare Part D Creditable Coverage

- ▶ **Two Ways to Test Creditability:**
  1. **Actuarial Equivalence Method**
  2. **Simplified Determination (Safe Harbor) Method** – Not available if plan is applying for retiree drug subsidy through CMS
- ▶ **Changes to Medicare Part D under the Inflation Reduction Act go into effect beginning in 2025, which has significantly impacted creditable coverage determinations using Actuarial Equivalence Method (but not Simplified Determination Method)**
- ▶ **When to Run Tests? No perfect answer, but we recommend:**
  - **Calendar Year Plans and 12/1-11/30 Plans** – Run tests and provide notices before 10/15 (based on anticipated Rx design for upcoming plan year)
  - **All Other Non-Calendar Year Plans** – Run tests before, and provide notices during, annual OE (based on Rx design for upcoming plan year)

# HIPAA Reproductive Health Care Rules

- ▶ Final regulations on Reproductive Health Care PHI
  - Generally effective beginning **December 23, 2024**
  - Except that updates to Notices of Privacy Practices (NPPs) not required until **February 16, 2026**
- ▶ Adds new prohibition on use or disclosure of Reproductive Health Care PHI for the following activities:
  - To conduct a criminal, civil, or administrative investigation into or impose liability on any person for seeking, obtaining, providing, or facilitating reproductive health care, where such health care is lawful under the circumstances in which it is provided
  - To identify any person for the purpose of conducting such investigation or imposing such liability

# HIPAA Reproductive Health Care Rules

- ▶ Plans must get signed attestation before disclosing if request is received for PHI that is potentially related to Reproductive Health Care and the request is for:
  - Health oversight activities;
  - Judicial or administrative proceedings;
  - Law enforcement purposes; or
  - Disclosures to coroners or medical examiners.
- ▶ HHS published [model attestation form](#) for this purpose
- ▶ Updates to HIPAA policies and procedures and Business Associate Agreements are recommended

# HIPAA Reproductive Health Care Rules

- ▶ **Update**: State of Texas filed complaint challenging new Reproductive Health Care PHI rules in federal district court on September 4, 2024 (State of Texas v. HHS (N.D. Tex. 2024))
  - Same federal district court that recently struck down prior HHS guidance applying HIPAA restrictions to online tracking technologies and parts of the ACA's preventive care rules
- ▶ Increased likelihood that court could temporarily enjoin, or even overturn, Reproductive Health Care PHI rules, particularly following Supreme Court's overturning of *Chevron* deference

# Other 2025 Compliance Considerations

- ▶ **Mental Health Parity – Confirm plans are in compliance with all MHP requirements, including new final regulations**
- ▶ **Proposed rules expanding ACA contraception coverage requirements**
- ▶ **Increased fiduciary litigation risk due to CAA and TiC rules, including newly-available public data – Consider implementing welfare plan (fiduciary) committee with formal charter and/or purchasing fiduciary liability insurance**
- ▶ **Student loan repayment benefits – Unless Congress acts, CARES Act student loan tax benefits will expire after 12/31/2025**
- ▶ **Continued expansion of state paid leave and disability laws**
- ▶ **Continued state and federal focus on prescription drug coverage and PBMs – monitor Rx industry trends, particularly with regard to GLP-1s and other high-cost Rx items**

# 2025 ACA Reporting Deadlines

## To Employees (1095-C)

- ▶ March 3, 2025

## To IRS (1094-C and 1095-C)

- ▶ Electronic Filers\*
  - ▶ March 31, 2025

\*Required if filing 10 or more returns in *aggregate* for the year

# ACA Reporting & Employer Mandate

- ▶ ACA reporting is its own requirement and has its own penalties but has significant implications for **employer mandate** penalties
- ▶ Applicable Large Employers: 50 or more full-time employees (including full-time equivalents) in the preceding calendar year
  - ▶ ALE Group Considerations
  - ▶ Full-Time Employees = **130** or more hours/month
  - ▶ Don't forget Full-Time Equivalents
- ▶ Form 1094-C and Forms 1095-C
  - ▶ Penalties: Increased to **\$330** per form (x2)
  - ▶ Electronic Filing **Now Required** for all ALEs



# ACA Employer Mandate – By The Numbers

	For 2024 Plan Years
Code Section 4980H(a) Penalty	\$2,970 (\$247.50/month)
Code Section 4980H(b) Penalty	\$4,460 (\$371.67/month)
Affordability %	8.39%  Coverage not <i>affordable</i> —and employee may be eligible for PTC for exchange coverage—if employee’s required contribution for self-only coverage exceeds <b>8.39%</b> of the employee’s household income.  Employer avoids 4980H(b) penalty if it satisfies <i>Affordability Safe Harbors</i> using <b>8.39%</b>

# Common ACA Reporting & EM Challenges

## ▶ Full-Time Status Determination Methods

### ▶ Month-to-Month

### ▶ Look Back Safe Harbor

#### ▶ New Employees:

▶ New Full-Time Employees → Three-Month Grace Period

▶ New Variable Hour, Part-Time, or Seasonal Employees → Initial Measurement Period Safe Harbor

#### ▶ Ongoing Employees:

▶ Look Back Safe Harbor using Standard Measurement Period

# Common ACA Reporting & EM Challenges

## ▶ Affordability

- ▶ Affordability Threshold = **8.39%** for plan years beginning in 2024
  - ▶ **9.02%** for plan years beginning in 2025

## ▶ Affordability Safe Harbors

- ▶ W-2 Safe Harbor
- ▶ Rate of Pay Safe Harbor
- ▶ Federal Poverty Level Safe Harbor

# ACA Affordability Safe Harbors

ACA Affordability Safe Harbor	Form W-2 Safe Harbor
The Basics	Employee's required contribution does not exceed <b>8.39%</b> of that employee's Form W-2 wages from the ALE Group for the calendar year
"Strings" Attached	<ul style="list-style-type: none"><li>• Determined <u>after the end of the calendar year</u> and on an employee-by-employee basis, taking into account the Form W-2 wages and the required employee contribution for that year.</li><li>• Employee's required contribution must remain a consistent amount or percentage of all Form W-2 wages during the calendar year (or during the plan year for plans with non-calendar year plan years)<ul style="list-style-type: none"><li>• An ALE is not permitted to make discretionary adjustments to the required employee contribution for a pay period</li></ul></li><li>• ACA Reporting rules allow full year contribution / 12</li><li>• Must Use Form W-2 Safe Harbor for all months of the calendar year</li></ul>

# ACA Affordability Safe Harbors

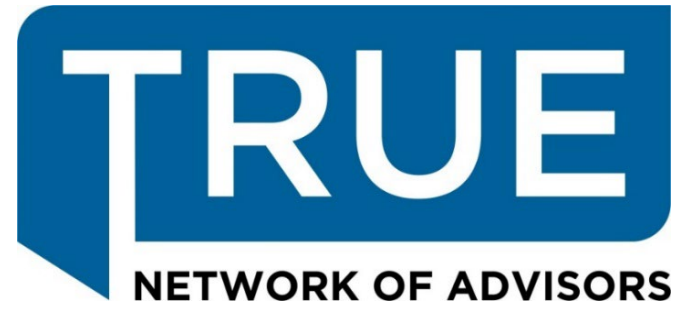
ACA Affordability Safe Harbor	Rate of Pay Safe Harbor
The Basics	<ul style="list-style-type: none"><li>• <u>Hourly employees</u>: satisfied for a calendar month if the employee's required contribution for the calendar month does not exceed <b>8.39%</b> of an amount equal to <u>130 hours</u> multiplied by the lower of the employee's hourly rate of pay as of the first day of the coverage period (generally the first day of the plan year) or the employee's lowest hourly rate of pay during the calendar month.</li><li>• <u>Non-hourly employees</u>: does not exceed <b>8.39%</b> of an amount equal to <u>130 hours</u> multiplied by the employee's monthly salary, as of the first day of the coverage period (instead of 130 multiplied by the hourly rate of pay).</li></ul>
“Strings” Attached	<ul style="list-style-type: none"><li>• Hourly employees: Must use <u>lowest</u> rate of pay (i.e., cannot count raises)</li><li>• Non-hourly employees: Unavailable if the monthly salary is reduced, including due to a reduction in work hours</li><li>• Generally does not work for tipped or commissioned employees</li><li>• May use for some or all months</li></ul>

# ACA Affordability Safe Harbors

ACA Affordability Safe Harbor	Federal Poverty Line Safe Harbor
The Basics	An applicable large employer member satisfies the federal poverty line safe harbor with respect to an employee for a calendar month if the employee's required contribution for the calendar month for the applicable large employer member's lowest cost self-only coverage that provides minimum value does not exceed <b>8.39%</b> of a monthly amount determined as the federal poverty line for a single individual for the applicable calendar year, divided by 12.
<b><i>“Strings”</i></b> Attached	<ul style="list-style-type: none"><li>• Basically no strings attached</li><li>• May use for some or all months</li><li>• Allows use of the Qualified Offer Method for ACA reporting</li><li>• Generally results in the lowest employee premium</li></ul>

# ACA Reporting & EM Takeaways

- ▶ Reporting for 2024 due in **Early 2025**
  - ▶ Electronic Filing Requirement & Increased Penalties
  - ▶ Are you an ALE?
  - ▶ Who is a Full-Time Employee for Form 1095-C purposes?
- ▶ Considerations when offering coverage and setting costs for next year:
  - ▶ Who is a Full-Time Employee?
  - ▶ Affordability Threshold = **9.02%** for plan years beginning in **2025**
    - ▶ **8.39%** for plan years beginning in **2024**
    - ▶ Based on employee's required contribution for the employer's lowest cost self-only coverage that provides minimum value
  - ▶ If utilizing a Safe Harbor: **BEWARE** of strings attached
- ▶ *May* be able to fix issues through ESRP process
- ▶ Work with your **TRUE Network** consultants!



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